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The Hon. André Ouellet, Minister

STUDIES

of

FOREIGN COMPETITION POLICY AND PRACTICE

Volume II

EUROPEAN ECONOMIC COMMUNITY	by T.D. MacDonald
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THE ROLE OF COMPETITION

in the

EUROPEAN ECONOMIC COMMUNITY

by

T.D. MacDonald, Q.C.

DECEMBER, 1975

FOREWORD

The purpose of the Paper is to describe the institutions and procedures relating to the implementation of competition policy in the European Economic Community (EEC) for possible relevance to the Canadian scene and particularly to Stage II of the revision of the Canadian combines legislation. Stage II relates principally to the control of mergers and monopolies, to specialization and export agreements, to price discrimination, to regulated industries, to trade practices and to class actions. The EEC system is very different, procedurally, from the Canadian system. To take two examples, exclusive dealing is dealt with in the Canadian system as a unilateral practice but in the EEC system on the basis of an express or implied agreement; and mergers are dealt with in the EEC system (insofar as they can be dealt with) from the stand point of abuse of a dominant market position. Again, the technical procedure under the EEC system is quite different from that under the Canadian system and the difference is as well or better illustrated by agreement cases of which there have been (including the exclusive dealing cases) quite a number than by the EEC merger cases of which there have been very few. For these and similar reasons an attempt has been made to describe the EEC system as a whole rather than restrict the Paper to the areas, above mentioned, which are to be dealt with in Stage II.

The Paper begins with some background information about the EEC, describes the Articles of the Treaty of Rome which relate directly and indirectly to the maintenance of competition, the institutions by which these Articles are administered, and the Regulations and Notices put out by such institutions for the enforcement

of Articles 85 and 86. It also mentions the sectors of the Common Market that have given rise to special treatment, rounds out the design of the EEC competition policy and its enforcement by reference to the decisions of the Court of Justice of the Community and of the Commission and includes a certain amount of comment both by the author and by informed critics at large. Where it appeared that the full description of a matter would take up too large a part of the text, footnotes and appendices have been resorted to. One appendix contains a list of jurisprudential rules derived from the cases and another appendix contains summaries of a number of leading cases with headnotes. There is a bibliography which falls far short of the very large volume of writing that has been done on the subject of the competition policy and procedures of the EEC. An attempt has been made in the conclusion part of the Paper (beginning at page 113) to sum up the thrust of such policy and its relevance to Canadian combines legislation.

The Paper was prepared having in mind both the general reader and the reader who is interested in more detail. The former may find that Chapters I, II, III, IV (pages 30-31 summarizing the Community institutions) and X will serve his purposes. The latter may find it convenient to use the selective index for reference to topics which interest him particularly.

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I. INTRODUCTION

The purpose of this Paper is to explore the role and the procedures of competition policy and administration in the European Economic Community (EEC) for any relevance the Community experience may have to Stage II of the revision of the Combines Investigation Act (CIA).

There are actually three Communities which share certain institutions: the EEC, the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom). Although competition plays a considerable part in the ECSC as well as the EEC, and references to it will therefore reoccur, the major interest lies in the EEC, which will be referred to variously as the "EEC", the "Community" and the "Common Market".

The role of competition in the EEC is interesting to Canadians from at least three particular standpoints, the first two of which are directly related, and the third of which is peripherally related, to the purpose of this Paper.

First, competition was assigned an important role by the architects of the Community for achieving the success thereof, and this was done not on the basis of a doctrinaire or esoteric approach but rather in the course of seeking practical measures that would make the scheme of the Community work and thus accomplish its declared task: "by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability,

an accelerated raising of the standard of living and closer relations between the States belonging to it". (Article 2 of the Treaty of Rome; this and each subsequent quotation from the Treaty which set up the Community, is a translation, the original official text being in French, Italian, German and Dutch.) The purpose of achieving optimum allocation of resources and efficiency or production and distribution was not to be defeated or restrained by privately imposed restrictions or practices.

Secondly, the Community is a federation of States that, beginning with an only slightly qualified economic integration, envisages a complete economic and political integration which will necessarily entrain some homogeneity of cultural interests as well, thus exhibiting in prospect a close parallel to the Canadian scene, and raising certain political-economic issues that attach to such a venture.[1]

Thirdly, Canada's Prime Minister has recently opened discussions with Member States about Canadian economic participation in the Community, a relationship for which the constitution of the Community already provides, and, if such a relationship is established, it will almost inevitably mean that Canada, Canadian businessmen, Canadian courts and other Canadian institutions will all be affected in some degree, and perhaps in some substantial degree, by the rules of competition that apply in the Community. Indeed, even without any such relationship, Canadian businessmen are already affected regarding their transactions in or with the various Member States of the Community and such affectation is bound to increase as more Canadian-based multinational firms develop. Why this is so will become

clear, particularly in some later sections which deal with the jurisprudence of the Court of Justice of the Community.[2]

I. FOOTNOTES

1. This statement may evoke some cynicism, but it is necessary to keep in mind long term objectives and some fairly solid accomplishments as well as current vicissitudes. The reader may be able to recall the tendency, even now, to refer to the "EEC" rather than to its components in contexts political as well as economic. As of this date (25 October 1975) the EEC has recently taken a political, and it may perhaps be said, cultural position on the Spanish execution of terrorists.

In 1972, the Heads of State or Government of the Member States requested that Community institutions prepare reports on a project, approved in principle, of a European Union that would incorporate all relations among Member States. The Commission recently completed its Report discussing the form that such a Union might take: it might take the form of a single organization based on principles held by all the Member States; a new Treaty would be required; the Community would work toward economic, social and monetary union, a common foreign policy, an integrated defence policy, the protection of human rights and right of direct economic intervention into the areas of regional policy and town and country planning, social welfare and worker migration; the Member States would retain the residual powers; and the necessary common institutions might include an independent executive body to absorb the functions of the Council and the Commission, and a bi-cameral legislative body representing the people and the Member States (the branch representing the people, at least, being based upon universal direct suffrage). The Commission recognized that the progression to the Union would take

place gradually over a long period of time. Membership might be open to "any European country having a democratic pluralist system and able to assume the responsabilities of membership". The system might be financed by the Union's "own resources". (The Community's present resources are revenue levies, customs duties and part of the value-added tax.) Upon the completion of submission of all the reports (Assembly and Court of Justice as well as Commission) the Prime Minister of Belgium was to be asked to submit a comprehensive report to the Heads of Government before the end of 1975, based upon such reports and upon consultations with the Governments of Member States and sources of public opinion in the Community.

(Background Note from the European Community Information Service, No. 24/1975, Washington, D.C., August 13, 1975; Annex to Information Memo from the Commission of the European Communities, No. P-32, Brussels, July 1975; CCH Common Market Reporter, Vol. 2, page 9691, paragraph 9768.)

See, however, on the pessimistic side, CCH Common Market Reporter, Vol. 2, page 9446, paragraph 9650: CCH Comment entitled "EC Council Split Over Commission Proposals to Cope with Italy's Measures." The opening paragraph reads:

> "The European Economic Community appears to be at a political standstill. After France's monetary breakaway in January (by letting the franc float freely instead of keeping it in the EEC monetary snake), the Wilson government's demand for rene-

gotiation of the entry terms and now Italy's import restrictions and Denmark's plans for similar action, the Common Market is in a precarious state, perhaps even the worst yet, because Italy's move shakes even the remaining and still functioning two foundations of the Common Market - the customs union and the common agricultural policy."

2. See CCH Comment: "European Commission Seeks Mandate to Negotiate New Type of Economic and Commercial Agreement with Canada", CCH Common Market Reporter, Vol. 2, page 9646, paragraphs 9749-51.

The CCH Common Market Reporter, (Vol. 1, page 1607, paragraph 2000) puts one aspect of the matter succinctly:

"Antitrust rules can affect a firm's selection of the method by which it does business in the Common Market. Management should consider anti-trust implications before deciding whether to organize a foreign subsidiary, purchase a minority or controlling interest in a foreign company, set up a jointly-owned company with an American or foreign concern, enter into licensing agreements or exclusive distributorship arrangements, enter into a distribution agreement with an American company already established abroad, organize a foreign company to do business with American companies abroad, open a branch office, or appoint a commission merchant."

The reader will of course substitute a reference to Canadian firms for the reference to American firms; and while the expression "Anti-trust rules" is apparently intended to

refer to the competition rules of the EEC, the Canadian firm should also, of course, keep in mind the provisions of the Combines Investigation Act and, as well, the antitrust laws of the United States, and the competition rules of any other country, whose nationals may be involved in arrangements made by the Canadian firm.

In what appears to be an informed dispatch carried in the Globe and Mail of December 11, 1975, it is predicted that Denmark's demands regarding non-discriminatory access to natural resources (a demand apparently based in this instance more on principle than pragmatism) will not prevent the start of negotiations early in 1976 for an economic and trade cooperation agreement between Canada and the EEC. It is estimated in the European Report of November 8, 1975 - No. 276, that 12.6 per cent of Canada's total exports went to the EEC in 1974, being 44 per cent of Canada's total exports not going to the U.S.

II. BACKGROUND INFORMATION

Nature of the Community

The EEC is an association of nine European States that have bound themselves by Treaty to Economic integration looking forward to political integration. Despite the re-examination of policy toward participation which has recently occurred in the United Kingdom, and notwithstanding the fact that withdrawal of a Member State could not be prevented (though it might be discouraged) by sanctions, the Treaty which binds the Member States makes no reference to a term and provides no procedure for disengagement. Article 1 of the Treaty is terse and categorical: "By this Treaty, the High Contracting Parties establish among themselves a 'EUROPEAN ECONOMIC COMMUNITY'." The Treaty of Accession of the three recently new Member States comprises three short Articles, the gist of which is that:

> The Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland hereby become members of the European Economic Community and Parties to the Treaties establishing these Communities as amended or supplemented.

and here again, no term is expressed and no provision is made for withdrawal. (Article 1 (1))

The original Member States of the Community are Belgium, Germany, France, Italy, Luxembourg and the Netherlands (in the order in which they are named in the Preamble to the Treaty). The Treaty entered into force on January 1, 1958. The Accession Treaty with Denmark, Ireland and the United Kingdom (again in the order of their mention) entered into force on January 1, 1973.

Norway refrained from joining by reason of an adverse popular referendum on September 25, 1972, but has entered into an agreement with the Community.

History

Inter-state arrangements for the advancement of commerce are not, of course, unknown to history, even to ancient history. The example of the Hanseatic League, whose roots go back to the 13th century, springs immediately to mind and is not irrelevant in spite of the early accent of that arrangement upon armed defence. Indeed, two of the original territories involved in the Community (Germany and Holland) were original participants in that exercise and two of the new adherents (England and Denmark), along with Flanders, concluded treaties with the League. It is also interesting to note that England, under Elizabeth I, withdrew the privileges of the League in England because it was considered by the Queen and her Ministers that England was not being accorded a sufficient measure of reciprocity, while the United Kingdom, under Elizabeth II, elected to continue in the Community as the result of a referendum. Statesmanship was much simpler in the old days. Germaene instances of modern arrangements are the Organization for European Economic Co-operation (OEEC), the Organization for Economic Co-Operation and Development (OECD), the European Payments Union, the Western European Union, and the General Agreement on Tariffs and Trade (the "GATT"). The European Free Trade Association (EFTA) deserves special mention.[3]

Early Attempts at International Conventions on Private Restrictive Practices

Two instances of attempt at agreement relating to international trade in the post World War I period are of peripheral interest in any study of internationally applied rules of competition: the Havana Charter of 1948 looking toward world-wide economic co-operation, which contained a chapter (Chapter V) on co-operation in the suppression of privately imposed restraints in international trade; and the Draft International Agreement on Restrictive Business Practices which was drawn up in 1953 by an Ad Hoc Committee of the Economic and Social Council of the United Nations. Canada participated actively in these endeavours. The Havana Charter was signed but never became effective. The Draft International Agreement was never signed.[4]

Community Objectives

The ideals of the Community, as expressed in Article 2 of the Rome Treaty, have already been referred to. The activities by which these ideals are to be achieved are described in Article 3 (when, hereafter, an Article is referred to it will be, unless otherwise indicated, an Article of the Rome Treaty) and include: the elimination, as between Member States, of custom duties and of quantitative restrictions on the import and export of goods and of all other measures having equivalent effect; the establishment of a common customs tariff and of common commercial policy towards third countries; the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; the adoption of a common policy in the sphere of agriculture; the adoption of a common policy in the sphere of transport; and the institution

<u>of a system ensuring that competition in the common market is not distorted</u> (emphasis supplied). Reference is also made to the co-ordination of economic policies, the remedying of disequilibria in balance of payments, the approximation to the necessary extent of Member State laws, the creation of a Fund for the improvement of employment opportunities and standards of living, the establishment of a Bank to facilitate economic expansion, and "the association of the overseas countries and territories [of the Member States] in order to increase trade and to promote jointly economic and social development".

II. FOOTNOTES

3. European Free Trade Association

The European Free Trade Association (EFTA) deserves special mention because of its close relationship to the EEC. The EFTA was formed when seven countries encircling the Community signed on November 20, 1959 the Treaty of Stockholm, which entered into force on May 3, 1960. The original signatories were Austria, Denmark, Great Britain, Norway, Portugal, Sweden and Switzerland. Finland and Greenland became associated in 1961. The principal objectives of the Association were to promote, within the area of the Association and each Member State, expansion of economic activity, full employment, increased productivity, rational use of resources, financial stability and improvement in living standards. Trade was to take place between Member States under conditions of fair competition and such States were to avoid significant disparities in the supply of raw materials, and to contribute to the harmonious development of world trade and to the progressive removal of barriers thereto. The Stockholm Treaty, unlike that of Paris, did not set up a common agricultural policy, and farm and fish products were generally excluded from its embrace. Both the EEC and the EFTA adopted the principle of free internal trade, but whereas the EEC is a customs union, the EFTA Member States maintained national tariffs on imports from non-member States. Inter-Member tariffs were eliminated completely or almost completely by the end of 1967. Other trade restrictions such as import quotas were also progressively reduced. The Stockholm Treaty contained many rules similar to the

competition rules established for the EEC, although it should be noted that this policy appears to have been adopted less because of strong convictions about the benefit of competition than because, like tariff barriers, restraints on competition can result in income transfers between countries. Limitations were also placed upon distortions of competition resulting from government aids and State trading. Article 15 of the Treaty dealt with restrictive agreements and abuse of dominant positions on the same principles as Articles 85 and 86 of the Treaty of Rome. However, the Stockholm Treaty created no supranational agencies for enforcement, and compliance rested upon the good faith of Member States supported in some instances by a declaratory function in the Council of the Association. In the 1961-1963 period all the Member States sought membership or associate membership in the EEC but because of the French veto, negotiations were not successfully concluded until 1971. Denmark and Great Britain withdrew and joined the EEC at the beginning of 1973. Of the countries then remaining in the Association (Austria, Finland, Iceland, Norway, Portugal, Sweden and Switzerland), all but two (Finland and Norway) entered individually into trade agreements with the European Communities (EEC, ECSC and Euratom) effective January 1, 1973. Under such agreements both parties (the Community and each acceding country) are to eliminate tariffs upon most of each other's industrial goods by some time in 1977. Norway and Finland have since entered into special agreements with the EEC.

4. Both cases illuminated the concept of the separation of legislative and executive powers inherent in the Constitution of the United States because the executive enthusiasm which the United States exhibited as a, or the, leading proponent during the negotiating stages was never contracted by Congress.

III. THE PRINCIPAL ARTICLES RELATING TO COMPETITION

The substance of the competition law of the Community is contained in Articles 85 and 86, the texts of which appear in Appendix A.

Article 85

Article 85 of the Rome Treaty refers generally to "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market". (The first two categories and from time to time the third will, for simplicity, be referred to in the following paragraphs as "agreements" or "agreements etc.").[4a]

Article 85 particularizes five categories of such agreements: agreements fixing prices and other trading conditions; agreements limiting or controlling production, markets, technical development or investment; market sharing agreements; agreements for the application of "dissimilar conditions to equivalent transactions" causing competitive disadvantage; and agreements for the attaching of unrelated supplementary conditions to contracts (in Canadian usage, "tied selling"). These categories are by way of exemplification; they are not exhaustive.

It will be apparent that Article 85 thus deals compendiously, in one context, with practices that are separately dealt with, or to be dealt with, in Canadian competition legislation. Thus, the first three categories in effect cover section 32 of the Combines Investigation Act relating to price fixing and similar re-

strictive arrangements; the fourth category partly covers section 34 which relates to discriminatory and predatory pricing, where the effects are brought about in the EEC by united action; and the fifth category covers the proposed section 31.4 to be added to the Combines Investigation Act by Bill C-2[5] again where the effects in the EEC flow from united action. Section 31.4 relates to the restrictive trade practices of "tied selling", "exclusive dealing" and "market restriction". It is also to be noted that the thrust of Article 85 (and of Article 86 as will be seen) is against effects on "trade between Member States"; intra-Member trade and external trade are not reached as such. In other words, the intention of the Article is to ensure that the plan to integrate the markets of the Member States is not impeded or defeated by private arrangements which may have the effect of maintaining separate markets within the Community.

Paragraph 2 of Article 85 provides, tersely, that "Any agreements or decisions prohibited pursuant to this Article shall be automatically void". For obvious reasons paragraph 2 does not refer to practices, because in respect of practices its wording would be inapt. This provision is significant because it means, as will be seen, that Article 85, is, to a considerable degree, self-enforcing.

Paragraph 3 of Article 85 provides that paragraph 1 may be declared inapplicable in the case of agreements or categories of agreements etc. and concerted practices or categories of concerted practices, which contribute to improving the production or distribution of goods or to promoting technical or economic progress, "while allowing consumers a fair share of the resulting benefit". However, in order to

qualify for exemption, agreements and practices may only impose restrictions indispensable to their purposes and they must not afford the possibility of eliminating competition in respect of a substantial part of the products affected. Thus, while it was pointed out that paragraph 1 of Article 85 covers matters related to sections 32 and 34 and the prospective section 31.4 of the CIA, paragraph 3 covers matters related to the subjects of specialization and export agreements expected to be dealt with in Stage II of the CIA revision.

As may be seen from the above, the leading characteristics that may bring an agreement etc. within the embrace of Article 85 are, first that it affect trade between Member States, and secondly that it distort, or be intended to distort, competition within the Community.

Article 86

The other "competition Article" - Article 86 of the Rome Treaty - covers matters related to those of section 33 of the CIA concerning mergers and monopolies (as defined in the interpretation section of the Act) which operate or may operate to the detriment or against the interest of the public. Article 86 declares, generally, that any abuse, "by one or more undertakings", of a dominant position within the Common Market or a substantial part of it "shall be prohibited as incompatible with the common market", if it may affect trade between Member States. As examples of such possible abuses the Article particularizes four categories: abuses which impose unfair prices or other conditions of trade; abuses which limit production, markets or technical development to the prejudice of consumers (or "users", in the EEC context); abuses which

apply dissimilar conditions to equivalent transactions, thereby placing trading partners at a competitive disadvantage; and abuses which attach unrelated supplementary obligations to trading contracts. It will be noted from this outline that Article 86 covers, from the standpoint of unilateral action, many of the effects which Article 85 covers from the standpoint of united action.

Implementation

Article 87 of the Treaty has as its purpose the implementation of Articles 85 and 86. It requires that the Council of the EEC, acting on a proposal from the Commission of the EEC, and after consulting the Assembly of the EEC, adopt appropriate regulations or directives for giving effect to Articles 85 and 86.[6] Such regulations and directives are to be designed to accomplish five objectives in particular: ensure compliance with Articles 85 and 86, by providing fines; lay down detailed rules for the application of Article 85, such rules to take into account the needs both to ensure effective supervision and to simplify administration; define, if necessary, the scope of application of Articles 85 and 86 to various branches of the economy; define the functions of the Court of Justice and the Commission; and determine the relationship between national laws and provisions deriving from the Articles of the Treaty relating to competition.

Provisions of the Rome Treaty
That Relate Less Directly to Competition

The Rome Treaty groups, with the Articles above described, Article 91 relating to dumping, and Articles 92 and 93 relating to State aids.

These Articles have a significant though indirect relation to competition. Together with some Articles of a more general and indirect interest they are described briefly in a footnote.[7]

Investigations

Article 89 provides that on application by a Member State or on its own initiative, and in co-operation with the competent authorities of Member States, the Commission shall investigate cases of suspected violations of Articles 85 and 86 and, if it finds that there has been an infringement, propose measures to end it. If the infringement is not thereby brought to an end, the Commission will write a reasoned decision about the infringement, publish the same and authorize Member States to take specified measures to remedy the infringement. It will be noted that the character of the Commission is that of both prosecutor and judge, a combination of functions that was much criticised in the CIA and led to its amendment in 1952 to divide the functions of the Commissioner between a Director responsible for investigation and a Restrictive Trade Practices Commission responsible for reporting; and the Commission under the Treaty partakes also of the functions of issuing orders which, under the amendments proposed by Bill C-2, will repose in the Restrictive Trade Practices Commission.

Public Undertakings

Article 90 is of particular interest to a federation like Canada. It provides that in the case of public undertakings and undertakings upon which have been conferred special privileges, Member States shall neither enact nor maintain in force any measures contrary to the competition oriented Articles of the Treaty. Undertakings entrusted with the operation of services of general economic interest, or being revenue pro-

ducing monopolies, are subject to the competition Articles insofar as such application "does not obstruct the performance... of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the community". For ensuring the enforcement of the Article the Commission may address appropriate directives or decisions to Member States.

III. FOOTNOTES

4a. It is implicit in the terms of Articles 85 and 86 and other related Articles that the basic rules of competition contained in these Articles apply, except as otherwise expressly provided, to all sectors of the economy of the EEC including the service sectors but excluding the coal and steel sectors which are governed by their own rules contained in the Treaty of Paris which is the constitution of the European Coal and Steel Community (ECSC).

In the Walrave case, of tangential relevance, the Court of Justice had to consider whether bicycle racing is a sport or a business. The Court said that the practice of sports was subject to Community Law (in this case the provisions relating to discrimination based on nationality) only insofar as it constitutes an economic activity within the limits of Article 2 (see page 2) of the Treaty; and this is a question for a national court to decide in each specific case.

(Walrave v. Union Cycliste Internationale, Case No. 36/74, December 12, 1974. Reports of Cases before the Court, Vol. 1974-8, page 405; CCH Common Market Reporter, Vol. 2, page 7339, paragraph 8290.)

5. Bill C-2, An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code. The Bill has been passed by Parliament and received Royal assent on December 15, 1975. It is to come into force, except as regards the extension of the combines section (32) to all services, on January 1, 1976 and, as regards such extension of section 32, on July 1, 1976.

6. The Rome Treaty (Article 179) distinguishes Regulations, directives, decisions, and recommendations, whether issued by the Council or the Commission. A <u>regulation</u> is of general application and binding throughout the Community; a <u>directive</u> is binding in respect of the result to be achieved, upon each Member State, but the manner of enforcement is for the national authorities; a <u>decision</u> is binding only upon those to whom it is directed; while a <u>recommendation</u> (and of course an <u>opinion</u>) is without binding effect.

7. <u>Articles of the Rome Treaty that relate less directly to competition</u>

<u>Dumping</u>

Article 91 relates to dumping <u>within</u> the Common Market and not to dumping therefrom, or thereinto by an outside State, the latter practice being taken care of elsewhere in the Treaty (particularly Articles 111 and 113. The Article provided that during the transitional period (until 31 December 1969) the Commission acting upon the complaint of a Member State or any other interested party, and finding that dumping was being practised, should address a recommendation to the person responsible for the purpose of ending the practice. If the practice nevertheless continued the Commission was to authorize the injured Member State to take protective measures. From the entering into force of the Treaty (January 1, 1958), products which originate or are in free circulation in, one Member State and

have been exported to another Member State are to have free re-access into the first-mentioned Member State. It was apparently assumed that, from the end of the transitional period, dumping from one Member State into another would be impractical and ineffective because, given the removal of trade barriers, the dumped goods, if the price differential was significant, would flow back to the Member State of origin.

State aids

Article 92 deals with Member State subsidization. The general rule is that any such subsidy which may distort competition by favouring particular undertakings or the production of particular goods, insofar as the subsidy affects trade between Member States, is incompatible with the Common Market. Three categories of aids are recognized as being compatible: aids of a social character granted to individual consumers without discrimination as to the origins of the goods; indemnifications for damages by way of natural disasters and the like; and aids granted areas of Western Germany affected by its post-war division. Four other categories of aids may be considered compatible: aid to counteract an abnormally low standard of living or serious unemployment in a particular region; aid to promote a common European project or to remedy a serious economic disturbance in a Member State; aid to develop particular economic interests or particular economic areas, not adversely affecting trade conditions to an extent contrary to the public interest; and other aid specified by the Council acting on a proposal from the Commission.

Under Article 93, the Commission is to keep all aids referred to in Article 92 under review and direct the Member State to abolish or alter an aid that is no longer compatible with the Common Market or is being abused. If such Member State does not comply, the Commission may refer the matter to the Court of Justice. The Council may, however, sanction an aid, otherwise prohibited, because of exceptional circumstances.

Tax discrimination

Articles 95 to 99 of the Treaty are for the purpose of avoiding discrimination, (and, it may be said, of indirectly removing restrictions upon competition) by a Member State against another Member State, by way of taxation, it being the purpose to arrive eventually at a single direct tax system for the Community. The first injunction of Article 95 is directed generally against discrimination in taxation upon products of Member States. The second injunction of Article 95 is of particular interest in the light of recent modifications in Ontario (soon removed) of the sales taxes in respect of motor vehicles: "... no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products".

Harmonization of national laws

Articles 100 to 102 relate to the harmonization of the laws of Member States, as a prelude to unification of such laws, in a wide area of topics. While the purpose is much wider than economic, involving social and other factors, the approximation first and unification later of such laws have also important implications for competition, e.g.,

laws relating to the composition of goods and standards of equipment.

Common commercial and economic policy

Articles 103 to 116 relate to measures directed toward the development of common economic and commercial policy and related matters. Here again it is evident that measures to which the Articles relate may have important implications for competition, e.g., measures relating to rates of exchange.

Social improvements

Articles 117 to 128 are directed toward achieving mobility of labour, improvement of living and working conditions, vocational training, social security and the European social fund.

Remaining Articles

European Investment Bank
Associated Countries

Articles 129 to 136 relate to the European Investment Bank whose purposes include aid to less developed regions, the modernising or converting of enterprises and the creation of new activities; and to the association, with the Community, of overseas countries and territories, looking to their economic and social development, ties with the Community and financial assistance.

Institutions
Financial matters

Articles 137 to 209 relate to the institutions of the Community and their functions and to financial provisions.

Article 177 provides, in effect, that where a question of interpretation of the Treaty of Paris or of the validity or interpretation of certain acts and measures deriving from the Treaty, is raised in a national court, that court may request a ruling from The Court of Justice and, where the question arises in such a court from which there is no appeal under the national law, than such court is bound to make such a reference.

Miscellaneous

The remaining Articles, 210 to 247, relate to miscellaneous matters including external relations.

IV. INSTITUTIONS OF THE COMMUNITY

Having described the Articles relating to competition, it will be convenient, before dealing with the measures by which they are implemented, to sketch the institutions that originate and enforce such measures. These institutions and their operation will appear somewhat complicated but in practice they appear to be working out effectively; they are principally the Assembly, the Council, the Commission, the Court of Justice and the Economic and Social Committee. There are additional, specialized bodies. Of course, all of the functions and powers of these bodies are derived only from the terms of the Treaty of Rome.

The Assembly. The Assembly consists of delegates who are nominated by the Parliaments of the Member States from among the members of such Parliaments. The Treaty envisages that eventually the members of the Assembly will be elected by direct universal suffrage. The functions of the Assembly are to advise and control. It may, for example, force the dissolution of the Commission.[8]

The Council. The Council consists of representatives of the Member States, each such State delegating one representative who is a member of the government of such State or at least the permanent head (Deputy Minister) of a department of such government. Each representative is supposed to act in accordance with the instructions of his State, but if he departs from such instructions the validity of the Council proceedings are not thereby invalidated. The functions of the Council are to ensure that the economic policies of the Member States are co-ordinated (Article 144). It may request the Commission to undertake studies and to submit

proposals based thereon for the achievement of Community objectives. Such proposals, when accepted, are embodied in Regulations of the Council which, for present purposes, confer powers upon the Commission.

The Commission. The Commission comprises thirteen members chosen on grounds of general competence and independence by agreement among Member States from among the nationals of such States (Article 158). Its functions have already been mentioned previously. Members of the Commission must act completely independently in the general interest of the Community (Article 157). The task of the Commission is to ensure that the provisions of the Treaty and the measures instigated by its institutions are carried out; to formulate recommendations and give opinions; to, itself, take decisions and participate in the shaping of measures taken by the Council and the Assembly; and to exercise such powers as may be conferred upon it by the Council. The Commission issues Regulations in implementation of the Regulations issued by the Council, and it also issues decisions in particular cases, and Notices and Guides of a general and informal nature as aids in the interpretation, by the business community, of its Regulations. For breaches of the Treaty, particularly Articles 85 and 86, it may impose fines. The Commission also, in specific cases, gives opinions and makes recommendations for the elimination of provisions in agreements etc. which might have the effect of bringing such agreements within the ban of the Treaty.

The Commission is strictly a Community institution, owing allegiance not to the States whence its members come, but to the Community itself. It enforces the substantive provisions

of the Treaty, and the junior legislation enacted thereunder. In the event of a Treaty violation it acts upon its own motion or upon complaint by a Member State or from a private firm or individual. For the enforcement of Articles 85 and 86 there has been established within the Commission a "Directorate-General for Competition" and, within the Directorate-General, a "Directorate for Restrictive Agreements and Monopolies". Since the background of members of the Commission is of interest in connection with their functions, some information as to the backgrounds is set out in a footnote.[9]

Court of Justice. The Court of Justice consist of nine judges, which number may be increased by the Council (Article 165). It is assisted by four advocates-general (Article 166). The function of the Court is to ensure the observance of law in the interpretation and application of the Treaty (Article 164). The judges and advocates-general are appointed by mutual agreement among the governments of Member States and must be chosen from persons whose independence can be guaranteed and who fulfill the conditions required for the exercise of the highest judicial functions in their respective countries or who are legal experts of universally recognized and outstanding ability (Article 167).

The Court of Justice performs a number of functions. If the Commission considers that a Member State has failed to fulfill an obligation under the Treaty it may issue a reasoned opinion, and, in the event of the State not complying therewith, the Commission may refer the matter to the Court (Article 169). A Member State that considers that another Member State has failed to fulfill a Treaty obligation may refer a complaint to the Commission which thereupon delivers a reasoned opinion (Article 170) and if the Court of Justice finds that there has been

such a failure, the offending State must take the measures required to implement the judgment of the Court (Article 171). The legality of acts of the Council or the Commission may be challenged before the Court by a Member State, the Council or the Commission on grounds of lack of jurisdiction, violation of basic procedural rules, infringement of the Treaty or misuse of powers. A private person may, upon like grounds, appeal to the Court against a decision of the Commission directed to or directly affecting him (Article 173). The Court, if it considers the complaint well founded, may annul the measure complained about (Article 174). A national court within a Member State refers, to the Court of Justice, questions arising before such court as to the interpretation of the Treaty and regulations made thereunder.

Economic and Social Committee. This is an advisory body to the Council and the Commission.

Before describing the enforcement procedures of the competition policy, the functions of the Assembly, the Council, the Commission, the Court and the Committee may be briefly summarized as followed.

The Assembly (frequently referred to as the "European Parliament") is advisory and exercises ultimate control of the Commission. It is also the body to originate changes in the Treaty. The Council is the executive agency which makes Regulations for the implementation of the provisions of the Treaty and for the purpose of delegating functions to the Commission. The Commission is the administrative body that enforces the provisions of the Treaty and Regulations made thereunder; it makes Regulations of its own within the powers conferred upon it by the Council; it also issues guides and recommendations of general or specific application; and it also rules upon the legality of agreements and practices and enforces its decisions by monetary penalties and positive directives. The Court of Justice

sits in review of the acts and measures of the Council and the Commission, when challenged before it. The Economic and Social Committee advises the Council and the Commission.

Non-contractual Liability of Community Institutions

An interesting feature of the EEC is the provision for non-contractual liability of its institutions. Article 225 of the Rome Treaty provides that the contractual liability of the Community "shall be governed by the [national] law applying to the contract in question", but that, in the case of non-contractual liability, "the Community shall in accordance with the general principles common to the laws (droits) of Member States, make good any damage caused by its institutions or by its servants in the performance of their duties". Illustrative of the latter liability is the Compagnie Continentale France case.[10] The Compagnie sued the Council for damages allegedly caused by the Council publishing incorrect information relating to export subventions.

The Compagnie carried on a grain exporting business. Article 55(1)(a) of the Act annexed to the Treaty of Accession of the U.K., Ireland and Denmark provided for compensatory amounts to be paid by an exporting Member State to compensate for differences in price levels between the new Member States and the Community as originally constituted. Article 55(6) provided that the compensatory amount so granted might not exceed the total amount levied by the granting State on importations from third countries, with power in the Council, on a proposal from the Commission, to derogate from this limitation.

The Council, by Resolution, agreed on a draft Regulation, to be adopted upon entry into force of the Treaty of Accession, which draft Regulation provided for a compensatory payment of \$42.33 per metric ton of the grain in question. Neither draft Regulation nor the Resolution made any reference to Article 55(6). By reason of an unanticipated increase in world prices, Article 55(6) became operative and the compensation payment was substantially reduced. In the interim between the publication of the Resolution and draft Regulation, and the definitive Regulation, however, the Compagnie had entered into large contracts for the export of the grain to England, based upon anticipated receipt of the higher compensatory payment, and hence the suit against the Council for heavy non-contractual damages.

The Court of Justice commented that the Council, having acted with the object of informing and guiding commercial operators, should have expressed a caveat as to Article 55(6) when publishing the Resolution and draft Regulation. The Court nevertheless failed to find a chain of causation between the behaviour of the Council and the alleged damage; the facts disclosed that the Compagnie, as a prudent exporter, not only ought to have known, from collateral circumstances, at the times it entered into the contracts, of the possibility of a downward revision of the compensation, in accordance with Article 55(6), but, as evidenced by its correspondence, did in fact, perceive such a possibility. The action was therefore dismissed, but, in view of the remissness of the Council, referred to above, each party was ordered to bear its own costs.

IV. FOOTNOTES

8. A Reuter news dispatch carried in the Press during the current month (December 1975) is to the general effect that the incoming President of the Community, Prime Minister Gaston Thorn of Luxembourg, had just said, in a radio interview, that the only positive achievement of the EEC during 1975 was that it had not collapsed, but that he had also said that the direct elections to the European Parliament, planned for May 1978, should be used to mobilize Europeans for the idea of Europe.

9. Background Information on Commission Members.

As of the date of publication of a "Directory of the Commission of the European Communities" in September 1975, the Commission comprised a president, five vice-presidents and seven other members.

The President, François-Xavier Ortoli, was born in Corsica in 1925. He obtained a law degree in Indo-China where he was first educated and in 1948 graduated from the French School for National Administration. Before his appointment to the Commission he had wide experience in various phases of government, economic and political. Immediately prior to appointment he was Minister of Industrial and Scientific Development and before that, Minister of Economic Affairs and Finance, Minister of Education and Minister of Supply and Housing, in reverse order of mention. (First appointed 1973)

Vice-President Wilhelm Haferkamp is a German who was born in 1923. He studied economics and sociology at the University of Cologne, held sociology and economics related positions with the German Trade Union Federation and with a German State government and was a member of the board of the Volkswagen Foundation. On the Commission his responsabilities have related to energy, economic, financial and statistical matters. (First appointed 1967)

Vice-President Carlo Scarascia Mugnozza is an Italian who was born in 1920. By education he is a lawyer and was a Member of the Italian Parliament and held various parliamentary and political offices. As a Member of the European Parliament he was active on various committees relating to political affairs, agriculture, social affairs and health, energy and relations with non-Member States. His responsibilities on the Commission relate chiefly to environmental and transport policies, consumer interests and public information. (First appointed 1972)

Vice-President Dr. Patrick John Hillery is an Irishman who was born in 1923. He graduated in Medicine and Surgery from University College Dublin and served in the public service as a Medical Officer and later as Minister of Education, Minister for Industry and Commerce, Minister for Labour and Minister for External Affairs. He played a leading role in the entry of Ireland into the EEC. His chief responsibility on the Commission relates to social policy. (First appointed 1973)

Vice-President Henri Simonet was born in Brussels in 1931. He took doctorates in law, economics and finance and was Professor of economic policy and public finance at the Free University of Brussels. He held various economics related government posts and served as a city mayor and Minister of Economic Affairs. He has published studies on economic, financial and political topics. His chief responsibilities on the Commission relate to energy policies, nuclear safeguards, harmonization of taxes and insurance and banking. (First appointed 1973)

Vice-President Sir Christopher Soames was born in the U.K. in 1920. Following a military and diplomatic career he entered Parliament, held various parliamentary posts and as a Minister of Agriculture, Fisheries and Food was prominent in the earlier negotiations for British membership in the EEC. (First appointed 1973)

Commissioner Albert Borschette was born in Diekirch in 1920. His academic background is Arts. He held various diplomatic and other posts under the Luxembourg government in several instances related to the European Communities. He was at one time deputy to the Minister of Foreign Affairs in negotiations with States applying for Community Membership. His chief responsibilities in the Commission relate to competition policy, personnel and administration. (First appointed 1970)

Commissioner Altiero Spinelli was born in Rome in 1907. His academic background is law and he worked for many years

in movements directed toward European federation. He was one-time visiting Professor at the Bologna Centre of the John Hopkins University School for Advanced International Studies, and Director of the Institute of International Affairs. His chief responsibilities on the Commission relate to industrial and technological policy. (First appointed 1970)

Commissioner Petrus Josephus Lardinois was born in Moorbeek in 1924. His academic background is agricultural engineering. He held various agriculture related Dutch governmental posts and also served as Minister of Agriculture and Fisheries. He was at one time a Member of the European Parliament. His chief responsibility on the Commission relates to common agricultural policy. (First appointed 1973)

Commissioner Claude Cheysson was born in 1920. His academic background derives from the Ecole Polytechnique and the Ecole Nationale d'Administration. He served in various technical advisory posts, domestic and foreign, was one-time chef de Cabinet to Premier Mendès-France and in 1962 became general manager of the Sahara Organization for the technical development of the Sahara, particularly as regards petroleum and later served as president of the State-owned Entreprise minière et chimique. (First appointed 1973)

Commissioner George Thomson was born in the U.K. in 1921. His early civilian career was journalism and editorial. He was, at various times, Minister of State in the Foreign Office, Chancellor of the Duchy of Lancaster with responsibil-

ity for political affairs in Europe and Secretary of State for Commonwealth Affairs; and he led the Labour Government's 1966-7 negotiation for British entry into the EEC. His chief responsibility on the Commission is for regional policy. (First appointed 1973)

Commissioner Finn Olav Gundelach was born in Veijle in 1925. He had held various posts related to NATO, the OECD and particularly the GATT. He headed the Danish Mission for the accession to the European Communities of Denmark. His chief responsibilities on the Commission relate to the internal market and the customs union. (First appointed 1973)

Commissioner Guido Brunner was born in Madrid in 1930. His academic background is law and economics with law degrees from Madrid and Munich. He served in various German government posts relating among other things to scientific and technological relations and foreign affairs and represented Germany in various international negotiations. His responsibilities on the Commission relate chiefly to education, research, science and statistics. (First appointed 1974)

10. Compagnie Continentale France v. Council of the European Communities, Case No. 169/73, February 4, 1975; CCH Common Market Reporter, Vol. 2, Court Decisions, page 7425, paragraph 8295.

V. ENFORCEMENT OF COMPETITION POLICY

The procedure for the implementation of Articles 85 and 86 is contained in Regulations enacted pursuant to Article 87. In a sense these Regulations are substantive because in certain instances they define classes of agreements and practices to which Articles 85 and 86 will be taken not to apply. While this may be looked upon as interpretative only, and therefore procedural, it must also be admitted to have considerable substantive effect. Generally speaking, the Council makes Regulations conferring powers upon the Commission and the Commission in turn makes Regulations for the implementation of such powers. The principal Regulations relating to competition policy will now be reviewed briefly in chronological order.

Principal Regulations Relating to Competition Policy

Council Regulation No. 17, effective March 13, 1962. This Regulation provides that the agreements, decisions and concerted practices referred to in Article 85 (first paragraph) of the Treaty and any abuse of a dominant market position within the meaning of Article 86, shall be prohibited, no prior decision to this effect being required. At the request of the businesses concerned, the Commission may, on the basis of the information immediately available to it, grant a negative clearance and may revoke the same. Acting upon a request or *ex officio,* the Commission may find an infringement of Article 85 or Article 86, and direct the enterprises concerned to end such infringement. In the alternative it may address, to the enterprises concerned, recommendations designed to put an end to the infringement.

Notification is required of any agreement referred to in Article 85 (first paragraph) for which an exemption is to be sought under Article 85 (third paragraph). The notification requirement is not applicable to agreements, etc. (i) where enterprises of only one Member State take part and the agreement etc. involves neither imports nor exports between Member States; (ii) where only two enterprises take part and the sole effect of the agreement etc. is either (a) to restrict the freedom of any party to fix prices or other conditions of resale of the goods acquired from the other party, or (b) to impose restraint on the exercise of industrial property rights or the right to acquire or use manufacturing processes or industrial knowledge; or (iii) where the sole object of the agreement, etc. is (a) the development or uniform application of standards and types, (b) joint research and development or (c) specialization, provided the products that are the object of the specialization do not represent, in a substantial part of the Common Market, more than 15 per cent of the volume of such products or substitutable products, and provided the total annual turnover realized by the participating enterprises does not exceed 200 million units of account.[11] An exemption under Article 85 (third paragraph) is valid for a specific period and may have conditions attached. It may be revoked (1) where the _de facto_ situation has changed relevantly; (2) where a condition is infringed; (3) where the exemption is based on false information or obtained by fraud; or (4) where the exemption has been abused.

A Consultative Committee on Cartels and Monopolies is consulted prior to the granting of an exemption under Article 85 (third paragraph). The Commission is given the necessary investigative powers. The Commission may conduct general as well as specific inquiries. The Commission may impose substantial fines where false or incomplete information is supplied, where the parties have wilfully or

through negligence infringed Article 85 (first paragraph) or Article 86 or a condition of an exemption, or for failing to conform with a direction of the Commission. The right to be heard is extended to all persons who demonstrate a sufficient interest. The confidentiality of secret trade information is provided for.

Commission Regulation No. 27 of February 6, 1962. It was early recognized that applications and notifications to the Commission in respect of negative clearances and other matters could have important legal consequences for all participating parties, and that while it should be open to any party to submit an application or notification, on the other hand the other party or parties should receive notice in order to have an opportunity to be heard in protection of their interests. The Regulation therefore provides that every enterprise which is a party to an agreement etc. specified in Articles 85 and 86 of the Treaty is entitled to file a request for a negative clearance, or a notification of an agreement etc. but that, if only one party files, he must inform the other parties so that they may, if they wish, exercise their right to be heard.

Commission Regulation No. 99/63. This Regulation relates chiefly to the right of prospective parties to be heard, and to due process generally, and to procedural matters related to these topics. Of some interest is Article 9. It provides that persons summoned may either appear in person or be represented by their legal or duly authorized representative chosen from their regular staff. Persons heard by the Commission may be assisted by attorneys or by senior teachers (professeurs) authorized to plead before the Court of Justice of the European Communities or by other qualified persons. The hearing is not to be public. Per-

sons are to be heard separately or in the presence of other persons summoned. In the latter case, due account is to be taken of the justified interest of enterprises that their business secrets be not divulged.

Council Regulation No. 19/65.[11a] This Regulation provides that the Commission may, by a Regulation, declare that Article 85 (first paragraph) is not applicable to groups of agreements - essentially exclusive distributorship agreements - in which only two enterprises take part and which fall within either of two categories. Under the first category, one enterprise agrees to deliver certain products to another enterprise only, for resale in a specified part of the Common Market or one enterprise agrees to purchase certain products from the other only, for the purpose of resale or the two persons reciprocally agree upon such obligations and restrictions. The second category relates to agreements that impose limitations upon the acquisition or use of industrial property rights. Any Regulation made by the Commission must define the group of agreements to which it applies and must specify what restrictions may not appear in such an agreement and what clauses must appear in such an agreement.

Commission Regulation No. 67/67. This Regulation is in implementation of the last-mentioned Council Regulation and is for the purpose of indicating the kinds of agreements that, in the view of the Commission, are eligible for, or likely to be eligible for, exemption under Article 85 (third paragraph). The Commission notes, in preliminary recitals, that on the basis of its experience to date, it finds it possible to define a first group of agreements and practices which can be considered as generally fulfilling the conditions for exemption set out in Article 85 (third paragraph). In the present state of trade,

exclusive distributor agreements in internal trade generally result in a wide variety of benefits; thus, by way of recitals:

> WHEREAS in the present state of trade exclusive dealing agreements relating to international trade lead in general to an improvement in distributing because the entrepreneur is able to consolidate his sales activities; whereas he is not obliged to maintain numerous business contacts with a large number of dealers, and whereas the fact of maintaining contacts with only one dealer makes it easier to overcome sales difficulties resulting from linguistic, legal, and other differences; whereas exclusive dealing agreements facilitate the promotion of the sale of a product and make it possible to carry out more intensive marketing and to ensure continuity of supplies, while at the same time rationalising distribution; whereas, moreover, the appointment of an exclusive distributor or of an exclusive purchaser who will take over, in place of the manufacturer, sales promotion, after-sales service and carrying of stocks, is often the sole means whereby small and medium-size undertakings can compete in the market; whereas it should be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in the agreements terms designed to promote sales; whereas there can only be an improvement in distribution if dealing is not entrusted to a competitor;
>
> WHEREAS as a rule such exclusive dealing agreements also help to give consumers a proper share of the resulting benefit as they gain directly from the improvement in distribution, and their economic or supply position is thereby improved as they can obtain products manufactured in other countries more quickly and more easily.[1]

Exemption, however, should depend on certain conditions including, particularly, the possibility

of "parallel imports". ("Parallel imports" means, in this context, the importation into a Member State affected by an exclusive distributorship agreement, by persons not party to the agreement, of the article in question from another Member State.) The Regulation therefore provides for exemption, pursuant to Article 85 (third paragraph) of the Treaty, until December 31, 1982, for agreements which fall within the first category mentioned in Regulation 19/65 supra. Besides these obligations, the only restrictions on competition that may be imposed on the exclusive distributor are not to manufacture or distribute, during the life of the agreement and for one year thereafter, products under agreement, not to establish a branch, and not to maintain a distribution warehouse outside the agreement territory. Also permitted, however, on the part of the exclusive distributor, is the obligation to purchase complete lines of products or minimum quantities; the obligation to sell the products under the trade marks or packaging prescribed by the manufacturer; or the obligation to undertake certain sales promotion measures. The exemption does not apply where the manufacturers of competing products grant each other exclusive distributorships, or where the contracting parties make it difficult for middlemen and consumers to obtain the product in question from other dealers in the Common Market. An exemption may be withdrawn for various causes including lack of competition from other products and unreasonably high prices.

Council Regulation No. 2821/71. This Regulation is also concerned with the application of Article 85 (third paragraph) to groups of agreements etc. The Preamble recites that the creation of a common market requires that enterprises adapt to the conditions of this larger market; that an appropriate means of adapting is through co-operation between enterprises; and that it is appropriate to enable the Commission to declare,

by means of a Regulation, that Article 85 (first paragraph) is not applicable to groups of agreements etc. relating to such things as (1) standards and types, (2) research and development and (3) specialization.

Article 1 of the Regulation provides that the Commission may, by Regulation, declare that Article 85 (first paragraph) is not applicable to groups of agreements etc. having the above-mentioned purposes. The Regulation of the Commission must be specific and must set out the restrictions or clauses that may or may not be included in the agreements, etc. Article 6 provides that the Commission must consult the Consultative Committee on Cartels and Monopolies in respect of any such Regulation. Article 7 provides that the Commission may determine in a given case that an agreement etc. covered by such a Regulation nevertheless has certain effects that are incompatible with the conditions set in Article 85 (third paragraph) and withdraw the benefits of the Regulation from the particular agreement etc.

Commission Regulation No. 2779/72. This Regulation was passed pursuant to Council Regulation No. 2821/71 mentioned above. It notes that agreements on the specialization of production in general help to improve the production of certain products by permitting manufacturers to operate on a more rational basis and offer such products at more favourable prices; and where there is effective competition it can be expected that users will share proportionately in the resulting benefit. The Regulation spells out the obligations and restrictions that may or may not be included in a specialization agreement. The Regulation is only applicable if the products covered by the specialization do not represent, in any Member State, more than 10 per cent of the turnover in the same or equivalent products

and if the total turnover of the participating enterprises within one fiscal year does not exceed 150 million units of account; but the exemption is not lost where, in two consecutive fiscal years, the market share of the turnover is not exceeded by more than 10 per cent.

Enforcement of Article 85: Enforcement of Section 32 of the Combines Investigation Act

The reader should keep in mind an important distinction in fact between the situation that faces the Commission in Europe and that which faces the Competition Bureau in Canada. In continental Europe, until the inception of the Communities or shortly before, there were few serious laws relating to competition or any such laws were often not seriously enforced. Hence, cartel arrangements that would have brought the parties, if in Canada, under the Combines Investigation Act were often carried on essentially in the open. Consequently the task of the Commission, under Article 85, has been basically to rule on agreements that were matter of record, in situations where the participating parties argued as to the effect and justification of their agreements rather than denied their existence; while in Canada, on the other hand, the agreements in question have been predominantly clandestine, thus involving the Director under the Combines Investigation Act in an initial task of detection and the participants, frequently, in a denial of facts as well as effects. It still remains to be seen, apparently, whether cartels in the Common Market have gone, or will go, underground.

Status for Appeal

Of interest are the words "direct and individual concern" in Article 173 of the Treaty of Rome which provides, in part, that "Any natural or

legal person may . . . appeal against a decision directed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to him", on the grounds mentioned in the Article.

As to the requirement for "direct . . . concern", this appears to be satisfied, in the case of a decision directed against a Member State, if the decision automatically leads to action that affects the individual in question, but not to be satisfied if the action complained about lies, notwithstanding the decision, in the discretion of the national authorities, in which case the "direct . . . concern" is considered to arise from the exercise of such discretion rather than from the decision itself. As to the requirement for "individual concern", the rule would appear to be that:

> Persons other than those to whom the decision was addressed can justifiably claim to be concerned individually only if the decision affects them because of certain characteristics which are peculiar to them or by reason of a factual situation which is, as compared with all other persons, relevant to them and by reference to which they may be individually described in a way similar to that of the addressee of the decision.[12]

V. FOOTNOTES

11. The "Unit of Account" (UA) is not in itself a currency, but a method of reconciling the problems of dealing in as many different currencies as there are Member States of the Community. Originally it was linked to, through gold equivalent, and corresponded with the U.S. dollar, i.e. one UA equalled one dollar. This year (1975), due in part to recent international monetary developments toward floating rates, the calculation of the UA was revised on the basis of a "basket" of the nine Member States' own currencies. Under the new system, as announced in April 1975, the UA has a "value in each constituent currency, ... equal to the sum of the following amounts of national currencies valued at their daily market exchange rate:

Deutsch mark	0.828
Pound sterling	0.0885
French franc	1.15
Italian lira	109.00
Dutch guilder	0.286
Belgian franc	3.66
Luxembourg franc	0.14
Danish kroner	0.217
Irish pound	0.00759"

(Background Note from the European Community Information Service, No. 12/75. Washington, D.C., April 30, 1975; CCH Common Market Reporter, Vol. 2, page 9626, paragraph 9738.)

11a. The recitals to this Regulation note that, because of the large number of notifications submitted pursuant to Regulation

Number 17, in order to simplify the task of the Commission, the latter must be put in a position to declare through a Regulation that the provisions of Article 85 (first paragraph) are inapplicable to certain groups of agreements and concerted practices; that it is necessary to specify the conditions under which the Commission may exercise the above mentioned power, in close and constant liaison with the competent authorities of Member States, when sufficient experience has been acquired through individual decisions and when it is possible to define the groups of agreements and practices for which the conditions of Article 85 (third paragraph) can be considered fulfilled; that Regulation Number 17 permits agreements etc. to be exempted by a specific decision of the Commission, particularly if they are modified in such a manner that they meet the conditions for the application of Article 85 (third paragraph); that the Commission must be able, through a Regulation, to grant such agreements, etc. the same exemption if they have been modified in such a manner that they belong within a group defined by an exemption Regulation; and that the Commission must have authority to lay down the conditions to be met by an agreement or concerted practice which, due to special circumstances, proves to have certain effects that are incompatible with Article 85 (third paragraph).

11b. This translation is from The Competition Law of the E.E.C.: James P. Cunningham - see Bibliography. A slightly different translation appears in CCH Common Market Reporter, Vol. 1, page 1881, paragraph 2727.

12. Direct and Individual Concern: An Almost

Insurmountable Barriers to the Admissabi-
lity of Individual Appeal to EEC Court,
Common Market Law Review, Vol. 11, No. 2,
May 1974, p. 191, and the cases therein
referred to and particularly p. 195.

VI. NOTICES, RECOMMENDATIONS AND GUIDES PUBLISHED BY THE COMMISSION

As will have been gathered from the preceeding parts of this Paper, the Commission, besides enacting Regulations, may also issue measures of a less formal character, five of which will now be referred to.

The Practical Guide.[13] Several years ago the Commission published a "'A Practical Guide' to Articles 85 and 86 of the EEC Treaty and the Relevant Regulations: A Manual for Firms". The purpose was to outline the steps to be taken in order to conform with, or claim the benefits of, the rules of competition contained in Articles 85 and 86 of the Treaty and the implementing Regulations, and to attempt "to answer the queries raised so far". The views expressed were declared to be without prejudice to decisions of the Commission or the courts in individual cases. Moreover, the Practical Guide was really descriptive, rather than interpretive, of the substantive provisions of the Treaty and was concerned chiefly with procedural aspects.

It may be noted in passing, however, that the Guide lays down, as a factor in deciding whether Article 86 is being offended, that "The dominant position as such is not prohibited; only the improper exploitation of it. What the Article is designed to prohibit is the abuse of a dominant position." The correctness, or at least the exactitude, of the first sentence must be doubted in the light of the Continental Can case.[14]

It may also be noted here, by way of comment, that a firm that entertains doubt as to the standing, under Article 85, of an agreement to which it is a party, has several practical courses of action: it may decide that the agreement comes

under the first paragraph of Article 85 and is ineligible for exemption under the third paragraph of Article 85, in which case it should terminate or alter the agreement accordingly; it may decide that the agreement comes under the first paragraph of Article 85 but can qualify for exemption, as it stands or modified in an acceptable way, under the third paragraph of Article 85, in which case it should apply to the Commission for such exemption; or it may have serious doubts as to whether or not the agreement comes under Article 85 at all, in which case it should apply to the Commission for a negative clearance. Needless to say, there is the additional alternative of the firm taking its chances of the agreement not being discovered, but this would be to incur serious risk of detection and punishment.

The Commission states, in the "Practical Guide", that "The value of negative clearance depends on the information available to the Commission at the time clearance is given. If some new factor comes in or additional facts are disclosed of which the Commission was unaware at the time of its decision, the value of the clearance may be challenged. It is therefore in the interests of the firms concerned to supply the fullest possible information." In other words, at this stage the Commission need not embark upon any enquiries of its own and the burden for supplying a firm basis for a decision is upon the parties applying for the "negative clearance". Indeed the passage quoted is an understatement because there is nothing to prevent the Commission from changing its mind upon reconsideration or by reason of the disclosure of facts which were unknown either to the Commission or the parties at the time of the decision, although in such an event the parties would, in fairness, be entitled to warning by way of withdrawal of the clearance, before sanctions were

applied. In the Guide, The Commission sums the point up as follows:

> Negative clearance merely signifies that the Commission considers, in the light of the information available to it at the time of its decision, that there are no grounds for intervening in respect of an agreement. As a rule, the Commission would decide to intervene subsequently only if changes in jurisprudence or the discovery of facts unknown to the Commission at the time of its decision made this necessary.

Official Notice on Patent Licensing Agreements.[15] The Treaty itself contains no exemption of industrial property rights (patents, trademarks, copyright, industrial design, etc.) from the Articles relating directly to competition. Article 36 under the title relating to the free movement of goods (removal of customs duties, quantitative restrictions,etc.) provides that the Articles under that title shall not preclude prohibitions or restrictions on imports, exports or goods in transit, justified on grounds of *inter alia* "the protection of industrial and commercial property" so long as such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States; and Article 36 has by the jurisprudence of the Court of Justice been drawn into the orbit of the provisions relating to the maintenance of competition.

The Commission has published, on one aspect of the subject, an "Official Notice on Patent Licensing Agreements", in which, "On the basis of its present knowledge of the circumstances", it considers that certain clauses frequently occurring in patent licensing agreements do not fall under the prohibition of Article 85 of the Treaty. These clauses relate to the limitations, restrictions and obligations that may be imposed

and accepted under agreements relating to patent rights, and the Notice explains at some length the rationale of each exemption.[16]

The net position, according to the Official Notice, appears to be that the existence of an industrial or intellectual property right is not affected by the Treaty, for example, the right of a person to exploit an invention himself or to decide that it shall not be exploited at all (if the national law so permits); but if the patent becomes the subject of an agreement going beyond the rights flowing directly and necessarily from the patent right itself, such agreement is subject to scrutiny under Article 85 of the Treaty; and if the prices charged for the product of the invention by the patentee can be shown, by some valid comparison, to be exorbitant, or some other condition of supply can be clearly shown to be conspicuously unreasonable, the patentee would be open to scrutiny under Article 86 of the Treaty for abuse of a dominant position.

Official Notice on Contracts for Exclusive Representation Concluded with Commercial Agents.[17] In order to discourage unnecessary applications for clearances and decisions in respect of exclusive distribution agreements, in 1962 the Commission issued an Official Notice distinguishing between arrangements made with independent entrepreneurs, which could raise a question of validity under Article 85, and those of a pure agency character which raise no such issues. The Commission said:

> ...The Commission considers that the determining criterion for distinguishing a commercial agent from an independent merchant is the provision made expressly or tacitly with respect to the assumption of the financial risks connected with sales or with the carrying out of the contract. Accordingly, it does not base its judgment on designation.

> Except for the usual del credere guaranty, it is not the function of a commercial agent to assume any of the risks involved in a transaction. If he assumes such risks, his activity is economically closer to that of an independent merchant and he must then be treated as such for purposes of the law of competition. Under such conditions, contracts for exclusive representation must be considered as agreements concluded with independent merchants.

The Commission noted the following particular factors which in its view would characterize an independent merchant: keeping on hand as his own property a considerable stock of the product in question; the organization, maintenance or guarantee of substantial free services to customers on his own account; or the determination of prices and other conditions of supply or purchase.

The Commission went on, then, to rationalize the distinction in terms economic as well as legal.

<u>Notice on Agreements, Decisions, and Concerted Practices Concerning Co-operation Between Enterprises</u>.[18] The Commission has envisaged its role to be not only that of preventing detrimental agreements but also of encouraging useful co-operation. In this Notice, issued in 1968, it said:

> The Commission welcomes co-operation between small and medium-size enterprises where such co-operation enables them to work more rationally and increase their productivity and competitiveness on a larger market. The Commission considers that it must facilitate co-operation among small and medium-size enterprises in particular. However, co-operation among large enterprises, too,

can be economically justifiable without presenting difficulties from the standpoint of competition policy.

The Commission went on to list categories of agreements which it did not consider would require an application for clearance or a notification under Article 85.

The first category comprises agreements having as their sole object an exchange of opinion or experience, joint market research, joint comparative studies of enterprises or industries and joint preparation of statistics and calculation models. The Commission warned, however, that the purpose of such agreements should be to supply the information necessary for independent competitive behaviour and they should not lead to a co-ordination of market behaviour either expressly or through concerted practices; and it pointed to the dangers inherent in the registration of orders, turnover figures, investment figures and prices with a special body and of specific recommendations as to the use of the material and models jointly prepared.

The second category comprises agreements having as their sole object: co-operation in accounting matters, joint furnishing of credit guarantee, joint debt-collecting agencies and joint business or tax consultant agencies. In the view of the Commission, agreements on these topics do not concern the supply of goods and services or economic decision making and they cannot lead to restraints upon competition, but it warned against allowing debt collection agencies to assume a pricing function.

The third category comprises agreements having as their sole object the joint implementation of research and development contracts and the sharing-out of research and development

projects. In this context, however, the Commission warned against placing restrictions on individual research or individual use of the product of joint research, or on the limitation of access by any of the parties to the results of the joint research and against the placing of undue restrictions on the granting of licenses to exploit the results of the research to outside parties.

The fourth category comprises agreements having as their sole object the joint use of production facilities, storage and transport equipment. While regarding such agreements as essentially organizational and technical, the Commission warned against them developing into agreements or practices for joint production, the sharing out of production and the establishment of joint enterprises.

The fifth category comprises agreements having as their sole object the setting up of working partnerships for the common execution of orders where the participants are not ordinarily competitors in the work to be done or where each by himself would be unable to execute the order. The Commission warned, however, against the participants undertaking to work solely within the framework of such an association.

The sixth category comprises agreements having as their sole object joint selling arrangements, and joint after-sale and repair service where the participants are not competitors in the products and services involved. The Commission observed that joint selling by small and medium-sized competing firms very often entails no appreciable restraint of competition.

The seventh category comprises agreements having as their sole object joint advertising.

The Commission warned, however, against the participants committing themselves against individual advertising.

The eighth category comprises agreements having as their sole object the use of a common label designating a level of quality where such label is available to competitors under the same conditions. The Commission warned against linking the label to obligations relating to production, marketing or pricing and, in particular, any obligation to produce and market only products of particular quality.

Notice on Agreements, Decisions and Concerted Practices of Minor Importance Not Coming within Article 85 (first paragraph) of the Treaty.[19]

The purpose of this Notice, issued by the Commission in 1970, is to promote co-operation between small and medium-size enterprises, which the Commission considers to be economically desirable and not objectionable from the standpoint of competition policy. The Commission reads Article 85 as forbidding only agreements that have "appreciable" effects on market conditions and not agreements which impair trade and competition "only slightly". The Commission believes that agreements do not come within Article 85 where (a) the products involved do not, in the part of the Common Market involved, account for more than five per cent of the turnover of the same and substitutable products and (b) the total annual turnover of the participants does not exceed 15 million units of account or, in the case of trading enterprises, 20 million units of account, or where, for two consecutive years such figures are exceeded by less than 10 per cent. In determining total turnover the transactions of various related persons and companies are taken into account.

"Pseudo-legislative" Acts of the Commission

Professor Walter van Gerven of the University of Louvain relates how the Commission, faced in 1962 with an immense number of notifications of agreements, made known its intention to issue group exemptions, under Article 85 (third paragraph) of the Treaty, for certain exclusive dealership and patent licensing agreements.[20] The Advisory Committee on Restrictive Practices and Monopolies of the EEC objected to this procedure but the Commission persisted. The Council thereupon rejected the Commission's proposal but approved a new proposal empowering the Commission to issue group exemptions for two specific categories of agreement and itself issued, accordingly, Regulation No. 19/65 pursuant to which the Commission issued Regulation No. 67/67 which provided exemption for described categories of exclusive dealing agreements. The same pattern of action led up to the issue by the Commission of Regulation 2779/72, providing exemption for certain categories of specialization agreements. Professor van Gerven described these patterns to illustrate what he considered to be the essentially legislative character of the Council and the essentially executive (or administrative) character of the Commission. Denied the discretion to make group exemptions under Article 85 (third paragraph), the Commission resorted to the device of Annoucements of categories of agreements which it would consider as not invoking the first paragraph of Article 85 and, therefore, not requiring exemption under the third paragraph of Article 85. Professor van Gerven surmises that the effect of these, "pseudo-legislative" acts (as he characterises them) should be that persons who have relied on them ought, in effect, to be entitled to exemption until the Commission withdraws its announcement in respect of them or, at least, should not incur monetary penalties for conduct prior to such

withdrawal. Apparently, however, third parties, or even perhaps the parties themselves to such an agreement, would not be estopped from alleging illegality in defence of a private suit.

While, then, the role of the Council is legislative, within the parameters of the Treaty, the role of the Commission is executive or administrative; the Council may grant the Commission a regulating power for the purpose only of implementing the measures enacted by the Council; and an important consequence of this status of the Commission appears to be that the Commission, in proceedings before it, while required to adhere to principles of natural justice and to make the assumed facts and its position in respect of the law sufficiently known to parties to enable them to meet a case against them (and to enable the Court of Justice, if called upon, to review the decision intelligently) is not required to make that complete disclosure of all the evidence and appraisal of all the arguments that would be required or expected of a court of justice. Moreover, rules of thumb are out, nor may the Commission stand aloof from the parties but must assist them in their endeavour to bring an agreement within the exempting terms of Article 85 (third Paragraph).

A lesson to be drawn from the foregoing by the draftsman engaged in setting up a legislative system of competition law is that, to the extent that the ordinary general law does not automatically determine the characteristics of the agencies created, the respective functions of such agencies should be carefully delineated from the standpoint of whether and to what extent they are judicial or administrative, what are to be the rules of <u>due process</u> in proceedings before them and what, if any, delegations of function are permissable.

VI. FOOTNOTES

13. CCH Common Market Reporter, Vol. 1, page 2051, paragraph 2801.

14. Europemballage Corporation and Continental Company v. Commission of the European Communities, Case No. 6/72, February 21, 1973. Recueil 1973-2, page 77; CCH Common Market Reporter, Court Decisions 1971-1973, page 8279-3.

15. Official Journal of the European Communities, No. 139, December 24, 1962, page 2922; CCH Common Market Reporter, Vol. 1, page 1843, paragraph 2698.

16. These clauses include inter alia "The limitation of the methods of exploitation of the invention ... (manufacture, use, distribution) to certain persons", "The limitation ... in time ... in area ... as to person" (paragraph A). Also named in the Notice are an "Obligation on the licensee to affix patent information on the product" (paragraph B); obligations relating to quality standards (paragraph C); non-exclusive and reciprocal exchange of know-how and the granting of licenses on improvements and new uses (paragraph D); and agreements by a licensor not to authorize any other person to utilize the invention or not to use it himself (paragraph E). The Commission states that "it does not seem possible to give a general opinion with respect to agreements relating to ... joint patents, ... reciprocal licenses, ... multiple parallel licenses."

    The Commission explains that the paragraph A exclusions are justified because they are covered by the patent; they involve only a partial retention of the right of prohibition incidental to the patent holder's exclusive right vis-a-vis the licensee, who is otherwise

authorized to utilize the invention. The paragraph B exclusions answer the patent holder's legitimate interest in having the protected object designated as originating from the patented invention. The purpose of the paragraph C exclusions is to allow the patentee to prevent a technically improper exploitation of the invention: "An obligation to obtain supplies of materials only from certain sources is in question only when quality cannot be judged according to objective standards." The obligations permitted to be imposed by paragraph D are not considered to restrict competition when it remains possible for licensees to transmit know-how and experience acquired by the licensor in the future; and the obligations permitted to be assumed by a licensor can be justified on like principles. The obligation first mentioned in paragraph E is not, as the Community now stands, likely to affect trade between Member States; and the second so closely approaches an assignment of rights that it does not seem to give rise to any objection.

. Official Journal of the European Communities, No. 139, December 24, 1962, page 2921; CCH Common Market Reporter, Vol. 1, page 1841, paragraph 2697.

. Official Journal of the European Communities, No. C75, July 29, 1968; CCH Common Market Reporter, Vol. 1, page 1847, paragraph 2699.

. Official Journal of the European Communities, No. C64, June 2, 1970; CCH Common Market Reporter, Vol. 1, page 1853, paragraph 2700.

. "Twelve Years EEC Competition Law (1962-1973) Revisited", Walter van Gerven, Professor of Law, University of Louvain, Common Market Law Review, Vol. 11, No. 1, February 1974, page 38.

VII. JURISPRUDENCE OF THE COMMUNITY

Articles 85 and 86 of the Treaty of Rome lay down the basic rules of competition within the EEC. Regulations issued by the Council and by the Commission have brought such rules to bear upon different kinds of behaviour. Decisions of the Commission have applied such rules to specific situations. Judgments of the Court of Justice have confirmed, modified or reversed decisions of the Commission. As would be expected in the case of a vigorous enforcement agency, in the given institutional setting, the decisions of the Commission tend to outrun the judgments of the Court; they tend also to be vindicated by such judgments. From this process there has emerged a large body of statutory, regulatory and jurisprudential law. The purpose of this part of the Paper is to fill in some of the legislative gaps in accordance with the jurisprudence of the Court and, in some instances, the as yet unchallenged decisions of the Commission. This will be done with a fairly large brush. Appendix B contains summaries of a selection of leading cases and the reader, by reference to the brief headnotes of the subject matters of the cases, can fairly easily trace the origin of each jurisprudential refinement. Appendix C is a catalogue of propositions taken from cases reviewed by the Court of Justice.

At the beginning it is to be noted that the competition rules as contained in Articles 85 and 86 do not stand individually or alone. They are complementary and they are related to other Articles of the Treaty which set out the aims of the Community, the means of achieving such aims and the free movement of capital, labour and other resources which is sought to be achieved. It is also to be noted that the competition Articles do not deal with mergers (to be discussed in a later section) or with concentrations of market power as such, although Article 86 has a

bearing on these phenomena. It is further to be noted that the essence of the behaviour prohibited by these Articles is the affectation of trade between Member States and the distortion of competition within the Common Market. In order for an arrangement to come under the prescription of Article 85, inter-Member State Trade must be appreciably affected and the intent or effect of the arrangement must be to prevent, restrict or distort competition within the Community. The objective of the Articles is to prevent the purposes of the Treaty from being defeated by private restrictions on trade and, particularly, by restrictions which would substitute themselves for the previous market isolation of national economies.

Article 85 applies not only to horizontal arrangements, and a large part of the decisions of the Commission and the judgments of the Court of Justice deal with vertical arrangements between producers and distributors whereby exclusive selling or buying rights are sought to be conferred. While only arrangements that affect inter-Member State trade are prohibited, arrangements that <u>prima facie</u> relate only to trade within one Member State may turn out to affect inter-State trade as, for example, where distributors in one State are so tied to producers within that State as to deny a significant part of the national market to suppliers in other Member States. Thus, not only competition between the parties is in issue but also whether an arrangement restricts competition arising from third parties. Not only to be considered are the terms of an arrangement themselves, but the arrangement must be looked at in the light of other arrangements between the same parties or with or between other parties and in the light of the complete economic and legal framework in which the arrangement exists. An arrangement that affects trade between Member States may nevertheless escape the

application of Article 85 because of the weak market position of the parties thereto and the expression in Article 85, "concerted practices", embraces oligopolistic behaviour falling short of actual agreement. Industrial property rights are not affected as such, but as soon as they are exercised through an agreement or by a firm in a dominant market position, such exercise is subject to Article 85 or Article 86. The level of selling price is relevant to the issue of abuse of a dominant position and the extension or entrenchment of such a position (if not the creation of one) is itself an abuse of a dominant position.

On the procedural side, a firm is amenable to Articles 85 and 86 in respect of behaviour it brings about in the Common Market notwithstanding it has no actual presence there, the only issue being how to reach it by fine or directive. The character of the Commission is administrative but it is bound so to express itself as to afford affected parties a meaningful opportunity to be heard and to afford the Court of Justice a meaningful opportunity of review. Whether related companies are to be regarded as an economic entity for the purposes of Article 85 or 86 or as capable of entering into a prohibited arrangement may depend upon the degree of autonomy each actually enjoys in respect of the other as well as their share positions.

Most of the cases that come to the Court of Justice under Articles 85 and 86 of the Rome Treaty arrive there by one of two principal avenues. The first avenue leads from a national court before which a question of interpretation of Article 85 or 86 is raised in a private action.

For example, in a patent or trade mark suit, a defendant may plead that the exercise of the patent or trade mark right has involved one of

the agreements forbidden by Article 85. If the national court entertains doubt as to the application of Article 85 to the circumstances of the case it may apply to the Court of Justice for a ruling; and if the national court is one of last resort it is required to make such a reference.

The other avenue lies by appeal from a decision of the Commission which, again for example, may, upon an enquiry instigated by itself or some other person, have found a contravention of Article 85 and imposed substantial fines. In such a case the person found against is ordinarily the plaintiff and the Commission is ordinarily the defendant.

In either event, the Court of Justice will hear the parties to the original suit or proceeding and any other party (including a Member State) who applies to intervene and shows a substantial interest in the outcome of the case. Following presentations by parties the Court is addressed by the Advocate General who makes a lengthy analysis of the law and the facts and suggests conclusions. The Court then prepares and publishes a judgment in which it, in turn, describes the facts, the issues, the pleadings and the law and at the end sets out a concise ruling. It may allow costs against any of the parties (including a Member State or the Commission) or withhold costs or direct that the costs abide the result in the national court in which the case arose. The judgment, including the ruling, is then returned to the national court or the Commission, as the case may be, to be implemented.

The cases summarized in Appendix B supply concrete examples of these procedures.

General thrust of competition policy

The general thrust of competition policy in the EEC, as indicated by the cases, is treated by Professor Walter van Gerven of the University of Louvain[21], in five suggested value judgments:

> The first of these value judgments is, obviously, the belief that a free market economy is, at least as a point of departure, a valid scheme, i.e. the belief that a system in which the decisions as to how, what and where to produce are taken not by a central authority but by free enterprises (be it within the limits set by the authorities), is a system which is desirable both for economic and political reasons. For economic reasons, because, in the words of the Zijlstra[22] report such a system promotes economic growth, keeps down costs, does not allow prices to result in over-profits and brings about the widest range of goods and services possible. It is a system of economic democracy in which the needs of the consumers are translated as perfectly as possible in the allocation of production factors. For political reasons, because such system is deemed to suit best a political democracy in the Western sense of the word, i.e. a system where power is spread over as many agents as efficiency permits.
>
> This first value judgment is expressed in many decisions of the Commission taken in respect of individual agreements which were notified to the Commission in view of obtaining a negative clearance or an exemption under Article 85 (third

paragraph). It appears therefrom that the Commission disapproves of all agreements which purport or tend to divide the Common Market in different markets in which competition is more limited, regardless whether the division is made along the lines of national frontiers or along other lines (such as e.g. for a group of manufacturers to divide wholesalers or retailers into approved and non-approved dealers) provided, of course, that inter-State commerce is liable to be affected thereby. Thus, e.g. exclusive dealership arrangements which do not permit parallel imports in the other dealer's territory or which tend otherwise to maintain different price levels in the various territories as well as all types of agreements between manufacturers to share markets or supply sources, to fix production or import quota, or to fix prices or make sales conditions uniform are prohibited as a general rule. Looking over the list of examples in Article 85 (first paragraph), there is, in fact, nothing astonishing in this, especially not in so far as horizontal agreements are concerned. A notable, point, though, is that the Commission, as of 1969, has shown its determination to fine enterprises which do not comply with the Commission's guidelines.

Professor van Gerven goes on to point out, however, that the generality of the foregoing value judgment is to be corrected by a second one, which is to the effect that what is envisaged is a "workable level of competition": not "as much competition as possible" but "as much efficient competition as possible". Professor van Gerven reads this approach into the favourable attitude

taken by Community institutions toward co-operation among enterprises, particularly smaller enterprises, as indicated by the Marine Paints case[23] and by the Commission's announcement of July 29, 1968 concerning co-operation agreements[24] and Council Regulation No. 2822/71 of December 20, 1971.

A third value judgment seen by Professor van Gerven is the so-called de minimis rule according to which an agreement is not prohibited if, by reason of the weak position of the parties thereto in the relevant market, it is unlikely to restrict competition or to affect inter-Member state trade in a significant manner. This rule may be derived from the Völk case[25], from announcements of the Commission of December 24, 1962 and May 27, 1970[26], and from Article 1 of the draft Regulation relating to merger control. Professor van Gerven sees the de minimis rule as related not only to the economics of the market, but also to the economics of the Community institutions in that it preserves their time for the more important cases.

A fourth value judgment suggested by Professor van Gerven is a distinction between the consequences of agreements and the consequences of other concentrations. The former are likely to have as an object and effect the keeping alive of the least efficient party, while if that party is drawn into an economic unity, it is likely to be made more efficient or abolished. The more favourable approach to concentrations is seen in a 1966 Concentration Memorandum[27] and in the Commission's opinions in the Christiani case[28] and the Kodak case[29] to the effect that agreements within an affiliated group are unlikely to restrict competition, which is likely already non-existent within the group, and are unlikely also to rely on consent since the subsidiaries must accept the instructions of the parent company.

The fifth value judgment postulated is that progressive concentration may lead to a situation

in which abuses of dominant position must be anticipated. This judgment is seen to be warranted by the proceedings in the Gema case[30], the ICI case[31], the Sugar case[32], and the Continental Can case[33]. "The last development," writes Professor van Gerven, "was clearly a first step to merger control."

Mergers

The Articles of the Rome Treaty that relate to competition make no reference to mergers. Nevertheless, in Article 86, the Commission has an instrument of sorts which can be used where a dominant position can be shown. This is illustrated by the Continental Can case[34].

This case held, in effect, that an abuse within the meaning of Article 86 occurs when an enterprise that is in a dominant position strengthens that position to the point where the degree of domination achieved substantially hampers competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise remain in the market.

The decision in the Continental Can case was the subject of interesting comment by a judge of the Court of Justice in a lecture given at the Centre of European Governmental Studies of the University of Edinburgh and at the University of Durham in October 1973[35]. The Judge said:

> The question was whether a concentration of undertakings can eventually constitute an abuse of dominant power. It is true that the examples of abuse of a dominant position given by Article 86 itself furnish no indication that its authors also had concentrations in view. Nevertheless, if one remembers that Article 86 is part of the rules on competition and that the Treaty, starting at Articles 2 and 3,

considers the maintenance of fair and efficient competition as one of the main objectives of the Community, it is not so strange to admit the possibility of a concentration that results in a considerable restriction of competition, eventually constituting an abuse. What does or does not constitute an abuse is a question of fact, not to be decided on the basis of some principle of natural justice, but in the light of the economic order that is aimed at by the system of law concerned. Apart from this the Court pointed out that while Article 85 forbids any agreements between undertakings resulting in the prevention, restriction or distortion of competition, it is inconceivable that Article 86 concerning unilateral action by an undertaking should be considered not to include such prevention, restriction or distortion effected, not by agreeing with other undertakings but by simply taking them over.

Although the opinion has been pointed out as a major addition to the Treaty - it meanwhile annulled the decision of the Commission on the facts - I must confess myself unable to see things in that way. But again the explanation may be that where others think the Treaty should be interpreted in a static and restrictive manner, to my mind it should be applied taking into account the development of the situation, notably the circumstance that the realisation of a Common Market has opened possibilities for concentration that perhaps were already imagined but not yet actual at the conclusion of the Treaty.

It is not too difficult, under the wording of Article 86, to accept an extension of a dominant position (or an entrenchment thereof) in the circumstances of the <u>Continental Can</u> case,

as an abuse of the original dominant position, but _quaere_ as to the _creation_ of a dominant position that brought about the kind of results achieved in that case, where there had previously been no dominant position.

The Commission, on July 18, 1973, issued the "Text of final draft regulation on the control of concentrations between undertakings".[36] It referred to the steadily increasing rate of concentrations in the Community; noted that the competition rules hitherto available did not deal adequately with the dangers to effective competition which result from the growing process of concentration; noted that the Community Treaties provide for a systematic control of business concentration only in the coal and steel sector; referred to the _Continental Can_ case; remarked that differing treatment, as between cartels and concentrations would, according to the views of the Court of Justice in that case "make a breach in Community legislation on competition which could jeopardize the orderly functioning of the Common Market"; noted that the effects of business concentration are particularly serious because the concentration brings about an irreversible alteration of the market structure; and set out the text of the "final draft regulation" the most important Articles of which are to the following effect:

Article 1. Basic Provisions

1. Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market in so far as the concentration may affect trade between Member States.

The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services.

2. Paragraph 1 shall not apply where:

- the aggregate turnover of the undertakings participating in the concentration is less than 200 million units of account and

- the goods or services concerned by the concentration do not account in any Member State for more than 25 per cent of the turnover in identical goods or services or in goods or services which, by reason of their characteristics, their price and the use for which they are intended, may be regarded as similar by the consumer.

3. Paragraph 1 may, however, be declared inapplicable to concentrations which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community.

Article 2 defines concentrations to include practically any effective control by one undertaking taking over another. The word "merger" does not appear in the definition.

Article 3 provides (paragraph (3)) that where a concentration has already taken place the Commission may require it to be broken up or may require "any other action that may be appropriate in order to

restore conditions of effective competition." If the Commission finds that the concentration is caught by Article 1 (1), but justified under Article 1 (3), the Commission may nevertheless attach obligations and conditions to its finding (paragraph (4)).

Article 4. Concentrations must be notified to the Commission before being put into effect unless the aggregate turnover of the undertakings concerned is less than one thousand million units of account. Where, however, a proposed concentration has already reached this amount, and the turnover of the undertaking proposed to be acquired is less than 30 million units of account, notification is not required.

Article 6. When a concentration has been notified to the Commission, the Commission must commence any proceedings within 3 months unless the undertakings under enquiry agree to an extension; if the concentration has not been notified the Commission may commence proceedings at any time if it considers that the concentration is caught by Article 1.

Article 7. A proposed concentration must not be put into effect within 3 months after it has been notified to the Commission unless the Commission informs the parties that it is unnecessary to commence proceedings. Once the Commission has commenced proceedings it may require suspension of the concentration pending the outcome of the proceedings.

Article 13. Failure to comply with the obligation to notify may entail the imposition by the Commission of a fine of from 1000 to 50,000 units of account. Where a concentration is proceeded with before the end of the time limit stated in Article 6, or in the face of an adverse decision of the Commission, the Commission may impose a fine not exceeding 10 per cent of the reorganized assets.

Articles 14 and 15. Failure to abide a decision of the Commission under Article 3(3) may be visited with a fine of 50,000 units of account for each day of default. All fines are reviewable by the Court of Justice.

Article 17. Decisions under Article 3(3) and (4) must be taken within nine months of the commencement of proceedings unless the parties concerned agree to an extension, but this limitation does not apply where the Commission finds it necessary to request information from the parties concerned or to conduct an investigation.

Other. The Commission has like powers of investigation as in respect of matters under Articles 85 and 86 of the Treaty of Rome. Although not so stated in the draft Regulation, all decisions of the Commission are appealable to the Court of Justice.[37]

That the Commission, in the meanwhile, is exploiting Article 86 and the decision of the Court of Justice in the Continental Can case in respect of mergers would appear from its answer to a question submitted by a Member of the European Parliament to the Commission on June 26, 1973 as to whether the Court would indicate as soon as possible its findings in respect of a proposed merger in the tire industry[38]. The Commission replied that the merger had not yet taken place; that the Commission was continuing to watch developments in this industry but in the absence of precise information on a specific merger it could not say whether such an operation would fall within the provisions of Article 86 of the Treaty.

According to a Background Note of July 25, 1973, from the European Community Information Service in Washington[39], the Commission has said, citing again the judgment in the Continental Can case, that "more systematic supervision of combinations of a certain magnitude" is necessary

to ensure effective competition and that it will seek power to ban proposed mergers where it judges they will conflict with the Common Market.

Section 3, comprising paragraphs 17 and 18, on page 19 of the Fourth Report on Competition Policy of the Common Market, published in April 1975, appears to hint at heavy going in the field of proposed merger control as will appear from the following description.

Having been consulted by the Council, Parliament and the Economic and Social Committee approved the Commission's draft regulation of July 1973, by large majorities. In the course of the discussions preceding the two votes, the Commission stated it was prepared to accept, by way of amendment to the proposal, the inclusion of a provision whereby competition in the world market would be taken into account when reviewing concentration cases; the inclusion, under the provisions for compulsory notifications, of cases of formation of joint subsidiaries by independent undertakings and groups thereof; and the replacement of 1000 million units of account by 1,250 such units as the aggregate turnover above which mergers of enterprises in the distribution sector would be subject to compulsory notification. The Council had commenced discussion of the proposal, by working party, in June 1974 and the worst controversial questions encountered concerned possible problems of reconciling national industrial, social and regional policies with decisions taken by Community authorities on individual concentrations. Nevertheless such problems arose in other areas of Community activities and had not been insurmountable. In any event the fact that there could be possible divergence between Community policy and individual national policies did not relieve the Commission of its obligation to take whatever

action might be necessary for the Community as a whole. As to the specific issue of parallel application of Community and national merger controls, a consensus of views was particularly important since significant social and other substantial interests could be at stake; and the Commission's view was, that while the Community should take proper account of national requirements, this should not be allowed to jeopardize the Treaty objectives of undistorted competition or of maintaining the institutional balances sought by the Treaty.

Article 66 of the Treaty of Paris (which will be discussed later), which governs the ECSC, requires prior authorization of certain mergers and concentrations by the Commission of the Communities. On April 8, 1975 the Commission issued a press release to the effect that it had authorized, under Article 66 of the Treaty, a merger between Fiat S.P.A. of Turin (an enterprise subject to the Treaty) and Klöckner-Humboldt-Dentz (KHD) of Cologne.[40] Under the merger, Fiat and KHD were to transfer, to a Dutch holding company (IVECO) to be controlled by Fiat, all their assets in the truck, bus and tractor sectors. The Release stated that "The effects of the operation on the market for trucks, buses and tractors have been examined in the light of Articles 85 and 86 of the EEC Treaty." The release continued:

> In the case of trucks and vehicles of more than six tons the Fiat group, with a 19.01 per cent share of the Community market, ranks second after the German group Daimler-Benz/Hanomag-Henschel (24.74 per cent). Following the merger the IVECO group will account for 22.29 per cent of the Community market (+ 3.28 per cent), without, however, altering its position.

The same is true for tractors, in which the IVECO group, with 18.10 per cent of the Community market, again ranks second after the Daimler-Benz group (23.56 per cent).

In the case of buses, the IVECO group will, on the basis of the figures available for the individual enterprises, control 9.17 per cent of the market, behind the Daimler-Benz group, which has 20.17 per cent of the Community market.

Since the parties have eliminated two provisions in IVECO's articles of incorporation that restricted competition, an examination of the merger reveals that it does not entail any restrictions of competition and does not represent an abuse of a dominant position by the enterprises involved.

This case has been referred to as a late example of the manner of dealing with mergers by the Commission of the ECSC and particularly because it illustrates the inter-relationship between the respective provisions of the Treaties of Paris and of Rome, in this case Article 66 of the former and Articles 85 and 86 of the latter.

The comments of Mr. Justice Donner, about the Continental Can case, which have been referred to above, provoke two thoughts bearing upon Canadian legislation. The first points to the purpose and advantage of a preamble which would assist the courts in filling what the Judge referred to as the "lacunae" of "legislative deficiencies and omissions". The second concerns the advantages of a legislative model which places, as does the Treaty of Rome, the whole or a major part of the underlying economic and political policy before the courts in such a way that a court cannot fail to consider it. A parallel

could be created in Canada by directing the Restrictive Trade Practices Commission and the Courts to interpret certain of the provisions of the Combines Investigation Act (e.g. those relating to trade practices, mergers and monopolies) in the light of commercial policies laid down in other Acts of Parliament, but with a proviso such as that contained in Article 85 (third paragraph) of the Rome Treaty to the effect that the exemption of any agreements etc. is subject to the overriding qualification that no such agreement etc. may be exempted if it affords the possibility of eliminating competition in respect of a substantial part of the products to which it relates.

Trade Marks

The facts of the Kaffee Hag[41] case which is the leading case[42] of the Court of Justice on the subject of trade marks, are as follows:

The German producer of Kaffee Hag, a decaffeinated coffee, before the War, originally owned the Hag trade mark for Germany, Belgium and Luxembourg and had assigned the trade mark for Belgium and Luxembourg to its Belgian subsidiary. The trade mark was expropriated, consequent upon the War, and a Belgian firm came into possession in due course of the trade mark for Belgium and Luxembourg and the shares of the Belgian subsidiary. The German firm, encouraged by the Sirena[43] and Deutsche Grammophon[44] decisions, started to make sales in Luxembourg and so exposed itself to a trade mark infringement suit. The Luxembourg Court referred to the Court of Justice the question whether the suit was barred by Article 85 of the Rome Treaty and the Treaty Articles relating to the free movement of goods. The Court of Justice noted that Article 85 was inapplicable but declared in the affirmative in respect of the other Articles. The Court considered that any danger of confusing consumers by coffees of different origin being

sold under the same trade mark could be avoided by such added indications as "made in Germany" and "made in Belgium".

The decision of the Court of Justice in the Sirena case, and to the same effect in the subsequent Kaffee Hag case, was strongly criticized by J.A. Kemp in an article "The Erosion of Trade Mark Rights in Europe".[45] The gist of Mr Kemp's attack against the reasoning of the Court is that, though a trade mark registered in two different States may have come from a common source, nevertheless when they are later found in the hands of two quite independent producers there is no guarantee, perhaps not even a legitimate assumption, that the qualities of the goods manufactured thereunder are the same. Hence, to allow a product produced in one country to come into and be distributed in another country under the common name of the two trade marks is to confuse and mislead the public and is unfair to the trade mark owner in the second country, particularly if he be a smaller entrepreneur.

Mr. Kemp attributes the Court decision to its acceptance of an argument advanced by the Advocate-General in the earlier Parke, Davis case[46], and he was particularly incensed by that lawyer's statement to the Court that "Originally the trade mark was intended to guarantee for the consumer the quality of a product, but now it tends more and more to be nothing more than a prop for advertising." Mr. Kemp sees it following logically from the creation of the EEC that, as a unitary trading area, it should provide for a trade mark within such area to be under the control of one person. In the meanwhile he argues that an existing trade mark should be used only by a person entitled thereto in the area of such use and that if a person wishes his goods to circulate under the same trade mark in different Member States he should select a new trade mark and register it in such State.

Mr. W. Alexander, in another article entitled "Some Comments on the Café Hag Judgment",[47] is more dispassionate. His point of interest is the question whether the Court of Justice will be led to distinguish, as regards inter-market penetration, between trade mark rights and patent rights. He concludes "that all these arguments in favour of a distinction will be found too light when weighed against the interest of a unified market defended so strongly by the Court of Justice". Holding this view he also believes that any special needs for exemptions in respect of patent agreements can be accommodated within Article 85 (third paragraph) of the Treaty of Rome, thus:

> Most arguments about the need for certain restraints in licensing agreements can be framed in terms of the conditions for an exemption. Article 85, paragraph 3 gives, moreover, room for a wide range of policy considerations: promotion of innovation and its diffusion, protection of small enterprise; protection by means of territorial limitations advocated by Jaume or rather price-fixing apparently preferred by Johannes. It offers the right basis for distinguishing between unilateral licenses on the one hand and cross-licensing and pooling of patents on the other hand, and allows taking into consideration the structure of the industry and the power of the firms involved. It can even be the basis for general rules to be laid down in block exemptions.

Mr. Alexander views with skepticism, however, the distinction sought to be maintained by the Court between an industrial property right and the exercise thereof.

A fair question is what would be Mr. Kemp's position had the German firm itself recovered (or retained) the trade mark and sold or licensed it to the Belgium firm, with or without a facade

of quality control, at the same time reserving to itself the right to distribute its own trade-marked product in the Belgium market. Presumably that situation, apparently possible under Mr. Kemp's preferred model, would have been equally confusing to consumers; and the confusion, in both cases, would have been avoided by the very simple expedient of indication of national origin suggested by the Court of Justice. On the facts of today's marketing practices, the situation where one producer creates large customer acceptance for a product by extensive and costly advertising, thus creating a valuable intangible product in a trade mark which he can then sell on the market as a new and questionable type of industrial property, is not unknown, and is at least as much at variance with Mr. Kemp's trade mark theory as what happened in the Kaffee Hag case. The most that can be said, perhaps, against the Advocate-General's statement is that it was too categorical and universal.

In conclusion it may be said that the jurisprudence of the Court of Justice, as exemplified in Appendix B, has gone a long way toward establishing the concept of a Community trade mark. The right of the owner to hold the trade mark and himself exploit it is not interfered with, so long at least as he does not use it in such a manner as to abuse a dominant market position; but once the trade mark becomes the subject of an agreement, such agreement is open to examination under Article 85 and the trade mark right cannot be used to divide markets where the effect would be to affect appreciably trade between Member States and the design or effect of the agreement is to restrict, prevent or distort competition within the Community. If the owner of a trade mark right is in a dominant position in the relevant market it would appear that his unilateral exercise of the right is open to scrutiny to ascertain whether the manner in which he is exer-

cising the right, for example, as a means of exacting excessive prices, is an abuse of such dominant market position.

Patents[48]

Writing in The Antitrust Bulletin Mr. Joseph D. Allen of the New Jersey Bar selects four recent Commission decisions as illustrative of the approach of the Commission to patent licensing agreements.[49] The facts of these cases[50] may be briefly stated as follows.

Burroughs - Delplanque and Burroughs/Geha-Werke cases. Burroughs, a U.S. company, conferred upon Delplanque, a French company, an exclusive right to manufacture plastified carbon paper in France and by a similar agreement conferred on Geha-Werke, a German company, the exclusive right to manufacture such paper in Germany. Both licensees and Burroughs remained free to market the product throughout the Common Market. Plastified carbon paper is of high quality and more expensive than ordinary carbon paper. The Commission decided that the agreements, although they could restrict competition, did not come within Article 85 (first paragraph) because the restriction was not appreciable, having in mind that the share of the over-all carbon paper market held by the parties was very small and that all the parties were free to sell the patented product throughout the Common Market. Nor was competition found to be restricted by the other terms of the agreements, particularly the licensees' obligation to keep secret, for 10 years after the expiry of the agreements, the technical know-how received from Burroughs to enable the working of the patents, this obligation being, in the opinion of the Commission, vital to Burroughs dealings with other persons. (The decision is criticised by Mr. Allen for failing to rationalize its non-acceptance of specialty paper

as a market separate from the remaining part (90 per cent) of the market for carbon paper.)

Davidson Rubber case. Davidson entered into patent license agreements with a German company, a French company and an Italian company, conferring upon each the exclusive right to manufacture and sell, within its national market, arm rests for cars and machinery for the manufacture thereof, under the Davidson patents. The Commission considered the agreements to have appreciable restrictive effects on competition within the Community and trade between Member States, the Davidson process being the key process and the licensees holding about one third of the Community market for such products. The Commission nevertheless found that the licensing agreements met the exemption conditions of Article 85 (third paragraph) because (a) they helped to promote technical and economic progress by making possible the exploitation of a key process in moulding arm-rests, (b) they reserved to users a fair share in the accruing benefit, since the latter found available in the Common Market parts for car interiors manufactured by a new technique, adapted to their special requirements and offering increased safety and greater comfort, and (c) they no longer imposed restrictions which were not essential to the attainment of their object. The exclusive rights were regarded as indispensable in the light of the market situation for the products and the investment necessary for the development of the process and its adaptation to market requirements. The prohibition against challenge of the validity of the patents had been lifted. The obligation to submit any dispute to arbitration was not likely to give rise to arbitration awards which might lead to different conclusions, notably in view of the fact that the text of the agreements provided that no clause might be invoked to oppose the sale between Member States of goods

covered by the agreements. In the opinion of the Commission, the agreements did not give the participants the power to eliminate competition to a substantial extent since there were other manufacturers of arm rests in the Common Market, and car manufacturers themselves met about one third of their requirements from their own resources.

The Raymond Nagoya case. The German subsidiary of a French company conferred upon a Japanese company controlled by the car maker Toyota an exclusive license, in respect of patents, know-how and utility models, to make and sell in the Far East plastic fixing devices used in making cars. The Japanese company was obliged to grant the French company a non-exclusive license under any improvement or otherwise related patents it might obtain. The Commission in this case granted a negative clearance in respect of Article 85 (first paragraph), conceding that the exclusive rights for the Far East and the ban on exports imposed on the Japanese company did not affect competition within the Common Market because, due to the characteristics of the products, their export from Japan to the Common Market was not a serious likelihood.

Considering these four cases against the background of the provisions of the Treaty, the relevant Regulations thereunder, the writings of authorities on competition law, and some related cases,[51] Mr. Allen expresses the following conclusions:

> It is evident that the Commission envisions its role of applying the rules of competition to industrial property licensing agreements as limited primarily to preventing the erection of artificial trade barriers within the EEC which strike at the very heart of the objectives of the EEC - promo-

tion of trade among the Member States and elimination of barriers to such trade.

Ancillary to this primary function, the Commission will attack, under the rules of competition, only clauses in such agreements that have no relation to the economic objective of industrial property rights, such as agreements not to contest the validity of the right or restrictions extending beyond the life of the right. Even where these clauses have no relation to the economic objectives of industrial property rights, the restrictions may well be permitted where the parties' market share is considered too small or where the agreement involves foreign industrial property rights and the Commission believes the restrictive effects of the agreements will not be felt within the EEC.

Finally, although the decisions represent an expansion of the scope of application of Article 85 (first paragraph) to exclusive patent licensing agreements, it is unclear from Davidson to what extent the expanded scope will be narrowed in effect by the application of the Article 85 (third paragraph) exemption.

These conclusions appear fairly and concisely to sum up the attitude of the Commission, likely, in the light of the related jurisprudence, to be supported by the Court of Justice, but subject, perhaps, to three _caveats_ concerning: the acceptance of the market analysis in the _Burroughs_ cases; the persuasiveness of the public benefits factor in the _Davidson_ case; and the apparent concern about the suppression of imports into the Common Market in the _Raymond Nagoya_ case. The "Official Notice on Patent Licensing Agreements", of the Commission, has

already been referred to in the previous section of this Paper relating to Notices etc. published by the Commission.

In a strongly worded comment on the <u>Draft Convention for the European Patent for the Common Market</u>,[52] the Commission takes exception to amendments and qualifications proposed for the Draft Convention. The proposals would seriously impair the effect of the Convention in preventing the partitioning of the Common Market into national markets through the exercise of patent derived rights. The Commission would also extend the thrust of the Convention to prevent a partitioning of markets through the device of the holder of parallel national patents assigning one or more of them to a person with whom he has no "economic connection". The subject is too technical to be further elaborated here, but the very lucid comment should be read in full by any person interested in the inter-face between anti-trust and patent law.

VII. FOOTNOTES

21. Van Gerven, op. cit., note 20.

22. A report prepared by Mr. Zijlstra and others for the Commission on economic policy and competition in the EEC and Member States and published in 1966 in the series "Studies, Competition" under No. 2.

23. Commission Decision of June 27, 1967 ("Trans-ocean Marine Paint Association"), Official Journal of the European Communities, No. 163, July 20, 1967, page 10. The exemption of the Association agreement was subsequently extended, with certain limitations, to December 31, 1976: Commission Decision of December 21, 1973, Official Journal No. L19, January 23, 1974, page 18; CCH Common Market Reporter, Vol. 2, page 9412, paragraph 9628.

24. Official Journal of the European Communities, op. cit., note 18.

25. Franz Völk v. Ets. J. Vervaecke s.p.r.l., Case No. 5/69, July 9, 1969, Recueil Vol. XV, 1969-4, page 295; CCH Common Market Law Reporter, Court Decisions 1967-1970, page 8082, paragraph 8074.

26. These references are to the Official Notice on Contracts for Exclusive Representation Concluded with Commercial Agents and the Notice on Agreements, Decisions, and Concerted Practices of Minor Importance Not Coming within Article 85 (1) of the Treaty, which have been described previously and are referred to in footnotes (17) and (19) respectively.

27. The footnote reference to this Memorandum, in Professor van Gerven's article, is as follows: "Cf. the memorandum on the problem of concentrations in the Common Market published by the Commission in 1966 under No. 3".

28. Commission Decision of June 18, 1969, in Re _Christiani-Nielsen_, _Official Journal_ of the European Communities, No. L165/12, July 5, 1969.

29. Commission Decision of June 30, 1970, in _Re Kodak_, _Official Journal_ of the European Communities, No. L147/24, July 7, 1970.

30. Commission Decision of June 2, 1971, in _Re Gema_, _Official Journal_ of the European Communities, No. L134/15, June 20, 1970.

31. Commission Decision of December 14, 1972 in _Re CSC-ICI/Zoja_, _Official Journal_ of the European Communities, No. L299/51, December 31, 1972.

32. Commission Decision of January 2, 1973, in _Re European Sugar Industry_, _Official Journal_ of the European Communities, No. L140/17, 1973.

33. _Continental Can_ case, _op. cit._, note 14.

34. _Ibid_

35. Judge A.M. Donner, "The Constitutional Powers of the Court of Justice of the European Communities", _Common Market Law Review_, Vol. 11, No. 2, May 1974, p. 127.

36. Document No. COM (73) 1210 final: Brussels, July 18, 1973; _CCH Common Market Reporter_,

Vol. 2, paragraph 9586, page 9300 _et seq_.

37. In reply to a question in 1975 from a Member of the EEC Parliament as to why progress was not being made on a merger Regulation, the Council replied:

> The Council examined the proposal for a regulation on the control of concentrations submitted by the Commission to the Council on July 20, 1973 as soon as it received the opinions of the European Parliament and the Economic and Social Committee. The examination highlighted the complexity of questions at issue and revealed the existence of many and varied problems concerning, in particular, the scope of the proposed regulation, the relationship between it and national systems for controlling concentrations, and institutional problems. As a result, the Council was unable to take a decision on this proposal by January 1, 1975, as it had envisaged in its resolution of December 17, 1973, on industrial policy.
>
> However, work is actively going ahead to enable the Council to take a decision on this proposal for a regulation at the earliest opportunity.

(Written Question No. 212/75, submitted by Mr. Notenboom, Member of Parliament, to the Council of the European Communities. _Official Journal_ No. C233, October 13, 1975.)

38. Written Question No. 711/72 submitted by Mr. Vredeling, Member of the European Parliament, to the Commission of the European

Communities, Official Journal of the European Communities, No. C47, June 26, 1973; CCH Common Market Reporter, Vol. 2, page 9298, paragraph 9583.

39. Background Note from the European Community Information Service, No. 18/1973. Washington, D.C., July 25, 1973; CCH Common Market Reporter, Vol. 2, page 9320, et seq., paragraph 9592.

40. Press Release from the Commission of the European Communities, No. IP(75) 67. Brussels, April 8, 1975; CCH Common Market Reporter, Vol. 2, page 9617, paragraph 9732.

41. Van Zuylen Frères v. Hag.A.G., Case No. 192/73, July 3, 1974. Reports of Cases before the Court, Vol. 1974-5, page 731; CCH Common Market Reporter, Court Decisions 1974, page 9115-3, paragraph 8230.

42. See also, however, the Winthrop case in which it was held, in effect, that for the holder of a trade mark in one Member State to seek to prohibit the sale therein of a product deriving from another Member State where it was sold under the same trade mark either by or with the consent of such first-mentioned holder, would be incompatible with the Treaty rules relating to the free circulation of goods: Centrafarm et al. v. Winthrop, Case No. 16/74, October 31, 1974; CCH Common Market Reporter, Court Decisions 1974, page 9151-58, paragraph 8247. It will be noted that in both the Kaffee Hag case and the Winthrop case the trade marks in the different Member States had a common origin. Quaere as to the position in regard to identical trade marks of different origins. See question by Member of Parliament and answer by Commission:

Written Question No. 433/74, Official Journal No. C19, January 27, 1975; CCH Common Market Reporter, Vol. 2, page 9583, paragraph 9712.

43. Sirena S. r.l.v. Eda GambH et al., Case No. 40/70, February 18, 1971. Recueil Vol. XV11, 1971-1, page 69; CCH Common Market Reporter, Court Decisions 1971-1973, page 7103, paragraph 8101.

44. Deutsche Grammophon v. Metro - S B - Brossmärkte, Case No. 78/70, June 8, 1971. Recueil, Vol. XV11, 1971-5, page 487; CCH Common Market Reporter, Court Decisions 1971-1973, page 7183-3, paragraph 8106.

45. J.A. Kemp: "The Erosion of Trade Mark Rights in Europe", Common Market Law Review, Vol. 11, Number 4, November 1974, page 360.

46. Parke, Davis & Co. v. Centrafarm, Case No. 24/67, February 29, 1968. Recueil Vol. X1V-2, page 81; CCH Common Market Reporter, Court Decisions 1967-1970, page 7810, paragraph 8054.

47. Common Market Law Review, Vol. 11, No. 4, November 1974, page 387.

48. In reply to a question put by a Member of the EEC Parliament to the Commission in 1974, the Commission stated, in part, that no progress was expected on an EEC patent convention until the question of Britain's continued membership was settled, but it was anticipated that a sufficient number of States would have ratified the (wider) European Patent Convention by the end of 1976 to permit the opening of the European

Patent Office in 1977. (Official Journal of the European Communities, No. C94, April 26, 1975, page 26; CCH Common Market Reporter, Vol. 2, page 9626, paragraph 9758.)

49. The Antitrust Bulletin, Vol. X1X, Number 1, Spring 1974, page 81.

50. These summaries are based on the O.E.C.D. Guide to Legislation on Restrictive Business Practices, Vol. 4, pages 83-85, EEC section: Decisions of the Commission of December 22, 1971 in the Burroughs - Delplanque and Burroughs - Geha Cases, Official Journal No. L13/72 of January 17, 1972; Decision of the Commission of June 9, 1972 in the Davidson Rubber Case, Official Journal No. L143 of June 23, 1972; Decision of the Commission of June 9, 1972 in the Raymond Nagoya Case, Official Journal No. L143 of June 23, 1972.

51. See particularly, the Parke, Davis case, op. cit., note 46.

52. Commission Opinion of September 26, 1975. Official Journal of the European Communities, October 9, 1975, page 26; CCH Common Market Reporter, Vol. 2, page 9723, paragraph 9777.

VIII. SPECIAL AREAS

The Treaty of Rome contains special provisions relating to Transport and Agriculture, in respect of which subjects the application of the competition rules contained in Articles 85 and 86 is modified.

Transport. Article 74 provides that the objectives of the Treaty in respect of transport shall be pursued by Member States within the framework of a common transportation policy. Article 75 provides that, for the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council, on a proposal from the Commission and after consulting the Social and Economic Committee and the Assembly, shall lay down rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States and prescribing the conditions under which nonresident carriers may operate transport services within a Member State. By way of exception, however, where the application of provisions concerning the principles of the regulatory system of transport would be liable to have a serious effect on the standard of living and on unemployment in certain areas and on the operation of transport facilities the Council must act unanimously and it must also take into account the need for adaptation to the economic development which will result from establishing the Common Market. Article 77 provides that national aids to transport shall be compatible with the Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service. Article 79 is directed against discrimination on grounds of country of origin or of destination. Article 80 is directed against rates and

conditions involving support or protection in the interests of one or more particular undertakings or industries, unless authorized by the Commission which shall take into account in particular the requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances on the one hand, and the effects of such rates and conditions on competition between the different modes of transport on the other hand. Article 84 provides that the Treaty relating to transport apply to transport by rail, road and inland waterways but that the Council, acting unanimously, may decide whether, to what extent and by what procedure, appropriate provisions may be laid down for sea and air transport.

Council Regulation No. 1017/68

In the result, transportation by rail, road and inland waterways, as well as sea and air transport, was exempt from the competition rules of the Common Market until Regulation No. 1017/68 of the Council came into effect on 1 July 1968. The application of such rules to sea and air transportation is still in abeyance and will remain so until the Council considers itself in a position to lay down specific rules for such modes of transportation. An article in the Economist for August 2, 1975, indicates, however, the intention of the Commission to inquire into the workings of the International Air Transport Association (IATA), through which international air carriers agree upon fares and tolls.[53]

The recitals of Council Regulation No. 1017/68 refer to the sometimes all too fragmented commercial structure of road and inland waterway transport and to the circumstances in which agreements and state intervention may and may not be acceptable. The recitals also note that enterprises rendering

services of a general economic interest should be subject to the application of the Regulation to the extent that such application does not in fact or in law hamper the performance of their special functions and that, in any event, the development of trade should not be impaired to a point that is contrary to the interest of the Community.

Article 1 sets out the basic provision: The Regulation applies to agreements etc. in the field of rail, road and inland waterway transport whose object or effect is to set transport rates and conditions, limit or control the supply of transport services, share transport markets, apply technical improvements or co-operation, or jointly finance or acquire transport equipment. Article 2 then sets out the agreements that are to be deemed prohibited without a prior decision being necessary, such agreements paralleling those that, under Article 85 (first paragraph) and Council Regulation No. 17, are prohibited in the case of goods and services. Article 3 enumerates the subjects of agreements etc. which are deemed not to be prohibited by Article 2: uniform application of standards and types for equipment and supplies; exchange or joint use of personnel, equipment carriers, or facilities; organization of connecting or combined services; establishment of package rates "inclusive of competitive prices"; routing of traffic; and "(g) the establishment of uniform rules for the structure and conditions for applying the transport rate tables insofar as they do not fix transport rates and conditions". Article 4 has in mind groups of small and medium-size enterprises. It exempts, from the prohibitions set forth in Article 2, agreements etc. which have the following purposes, but subject to the qualification mentioned:

- the creation and activities of groups of road and inland waterway transport enterprises,

- the joint financing or acquisition of transport equipment or supplies directly connected with the performance of transport services in so far as this is necessary for the common business of such groups,

and the combined loading capacity of the group does not exceed:

- 10,000 tons for road transport
- 500,000 tons for inland waterway transport.

The individual capacity of each enterprise belonging to the group may not exceed 1,000 tons for road transport or 50,000 tons for inland waterway transport.

(2) Where the application of agreements, decisions, or concerted practices referred to in paragraph 1 has, in individual cases, effects that are incompatible with the conditions set forth in Article 5 and that constitute an abuse of the exemption provided in Article 2, the enterprises and associations of enterprises may be compelled to put an end to such effects.

Article 5 provides for the exemption of agreements etc. which contribute to the improvement of the quality of transport services, to the promotion of greater continuity and stability of services, to an increase in productivity, or to the promotion of technical or economic progress. Such agreements etc. must, however, take into consideration the interests of transport users, and must not impose restrictions that are not essential to achieve such objectives or make it possible for the enterprises to eliminate competition for a substantial part of the transport market in question.

Article 8 is parallel to Article 86 of the

Treaty relating to abuse of a dominant market position (see Appendix A). Article 9 is parallel to Article 90 of the Treaty relating to dumping.

In October 1973, the Commission issued a press release urging a common transport policy within the Community. The Commission had sent the Council a communication proposing that new impetus be given to the further development of the common transport policy. "This", said the Commission, "will involve measures at the enterprise level with a view to creating conditions under which transport enterprises can compete." The Commission remarked that, within a transport system integrated at the Community level "the transport enterprises would furnish their services on a market where free and healthy competition prevails, which is required for a true common transport market". The Commission envisaged that the development of this common policy would necessarily take several years. Co-ordination of investment programs of Member States "must take all modes of transport into consideration, including sea and air transport, oil pipelines and new technology." At the level of transport enterprises the Commission contemplated "measures for equal conditions of competition ...". Proposals on the control of capacity and transport rates and conditions could play a part only until the "common transport market" was created. The Commission at the same time noted that "In seeking the optimum size of transport enterprises, structural measures will have to be taken." There must also, said the Commission, be "co-operation between all transport networks and modes of transport in both the technical and commercial fields." The Commission said that, as a first step toward further development of the common transport policy it was proposing "a series of special measures in the nature of an action program

for three years, 1974 to 1976, and preparatory work for the year beyond". On June 27, 1974 the Vice-President of the Commission made a statement to the Council on the progress of the Commission with regard to the "common Transport Policy." He stated that, "In the field of sea and air transport as well as of the ports, the Commission is following up the ideas expressed in its communication." The later interest of the Commission in this latter field has already been noted.

Agriculture. Article 38 provides that "The common market shall extend to agriculture and trade in agricultural products." "Agricultural products" is defined to mean the products of the soil, of stock-farming and fisheries and products of first-stage processing directly related to such products. Save as otherwise provided in the following Articles 39 to 46, the rules laid down for the establishment of the common market are to apply to agricultural products. (The products actually subject to such Articles are specified in Annex II of the Treaty.)

The operation and development of the common market for agricultural products is to be accompanied by the establishment of a common agricultural policy among the Member States. Article 39 sets out the objectives of the common agricultural policy: increase of productivity by promoting technical progress and by ensuring the national development of production and the optimum utilization of resources, particularly labour; a fair standard of living in the agricultural community; stabilization of markets; assurance of supplies; and "reasonable" consumer prices. In working out common policies, account is to be taken of the particular nature of agriculture including its social aspects, the need to make adjustments by degrees and the relationship of agriculture,

within each Member State, to the over-all economy of that State. Article 40 provides that, in order to attain the objectives described in Article 39, a "common organization" of agricultural markets shall be established and shall take the form, depending on the product concerned, of (a) common rules on competition or (b) compulsory coordination of national market organizations or (c) a European market organization. The common organization may take all measures required to attain the objectives stated in Article 39, and in particular, regulation of prices, production and marketing aids, storage and carrying facilities and common machinery for stabilizing exports or imports. The common organization must exclude discrimination between producers or consumers within the Community. Article 41 provides that, to help reach the objectives stated in Article 39, provision may be made for coordination of vocational training, research, dissemination of agricultural knowledge and joint financing of projects and institutions; and provision may also be made for joint measures to protect the consumption of particular products. Article 42 provides that the rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council in accordance with Article 43 (2) and (3), account being taken of the objectives stated in Article 39; and the Council may, in particular, authorize the granting of aid (a) for the protection of enterprises handicapped by structural or natural conditions; and (b) within the framework of economic development programs. Article 43 depicts the method of implementation of the common agricultural policy; the Council, on the basis of a proposal by the Commission, will make Regulations for working out and implementing such policy, including the replacement of national organizations by one of the alternatives described in Article 40 above; and the Council may replace national market organizations by the common

organization referred to in Article 40 provided (a) the common organization offers equivalent safeguards in respect of employment and living standards, and (b) such common organization ensures conditions for trade within the Community similar to those existing in a national market. Article 44 contemplated the establishment of minimum price systems where necessary to protect the objectives stated in Article 39, but it has never been invoked. Article 46 provides for the application of import countervailing charges to counterbalance the competitive advantage conferred upon exports by national marketing organizations.

Council Regulation No. 26 of 1963

This Regulation applied selected rules of competition to the production of and trade in agricultural products. It cited the need that certain rules of competition be made applicable to such production and trade in order to eliminate practices contrary to the principles of the Common Market and prejudicial to the attainment of the objectives stated in Article 39 "and in order to provide a basis for the future establishment of a system of competition adapted to the development of the common agricultural policy". It also recited the rationale of such application: the principles of Articles 85 and 86 of the Treaty are to be applied to production of and trade in agricultural products "insofar as their application does not impede the functioning of national organizations of agricultural markets or jeopardize attainment of the objectives of Article 39 of the Treaty".

Article 1 of Regulation No. 26 provides that the competition Articles (85-90) and measures in implementation thereof shall apply to production of and trade in agricultural products, subject to the exceptions stated in Article 2. Article 2 provides that Article 85 of the Treaty shall not

apply to agreements etc. that "form an integral part of a national market organization or are necessary for the obtainment of the objectives set out in Article 39 of the Treaty." In particular it shall not apply to agreements etc. of farmers and their associations, belonging to a single Member State, which relate to the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products "and under which there is no obligation to charge identical prices", unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized. The Commission is to determine what agreements etc. meet the conditions mentioned and to undertake such determination on its own initiative or at the request of a Member State or an interested undertaking or association of undertakings. Article 3 provides that Article 91 (1) of the Treaty (relating to dumping) shall apply to agricultural products, and that parts of Article 93 (review of systems of aids) of the Treaty shall apply to such products. A comment in the CCH Common Market Reporter upon the difficulties being encountered in implementing the common agricultural policy for the Community is referred to elsewhere.[54]

Banking

The Rome Treaty makes no special provision in respect of the Banking industry. It has been reported, however, (as of 13 February 1973), that the Commission was considering issuing specific Regulations for such industry. Consideration had apparently progressed to the stage that the Banking Federation of the EEC had submitted a memorandum to the Commission. It was also noted that, before arriving at a decision, the Commission would consult with the Monetary Committee of the Community.[55]

Insurance

The competition rules of the EEC apply to the insurance sectors of the Common Market without qualifications. The Commission has nevertheless appeared to believe that this industry may present special characteristics calling for a particular Regulation. Several years ago the Commission began a dialogue with the European Committee of Insurance. Depending upon the information the Commission obtains and its appraisal thereof the Commission will presumably direct its attention to the necessity for any special Regulation and, if so, to the principles thereof. In the meantime, the industry has not been treated as exempt or gone without scrutiny. Early in 1969 the Commission indicated to a number of insurance companies operating in a number of Member States that in its view a number of their agreements were in contravention of the competition Articles of the Treaty and the companies discontinued the objected-to items without requiring the Commission to commence proceedings against them. There may have been other activities on the part of the Commission in the insurance sector which had not reached a level at which they would be publicized.[56]

Consumer Protection

It will have been noted, from earlier parts of this Paper, and it may also be noted from several of the cases summarized in Appendix B, that Articles 85 and 86 are self-enforcing to the extent at least that they may be pleaded in defence of private suits in national courts. A related question is whether contraventions of these Articles afford original causes of action on the part of persons who consider themselves damnified by the conduct constituting the contravention. In 1972 a Member of the EEC Parliament asked the Commission "Does the Commission share the opinion of the Dutch Government that there is something to be said for purchasers being able in certain cases to claim damages for injuries that they have sustained as a result of the infringement ... of Articles 85 and 86 of the EEC

Treaty?" The Commission replied to the effect that it believed that such suits could be an important supplement to its own enforcement efforts; that the availability of such right of action depended upon national law; that it had arranged for a study of the subject and published the result thereof in 1966; and that the experts who had done the study had concluded that where the competition rules of the Treaty had been violated, the injured parties could, under national law, obtain indemnification in any form permitted by such law: damages, cease and desist orders, penalties and publication of judgments. The Commission added that the principle was applied differently in different Member States; in Germany and Holland, e.g., there was a distinction depending on whether private interests, or only the public good was intended to be protected; that attention should be directed to the remedies thus presently available under national laws; that the effectiveness of the latter would depend partly on whether consumer associations could claim on behalf of their Members; that important problems related to proof and assessment of damages; and that the Commission intended to ensure better circulation of the 1966 study and to publish the legal remedies existing in the three new Member States.[57]

VIII. FOOTNOTES

53. *The Economist*, August 2, 1975: "Skyway Robbery".

54. *op. cit.*, note 1

55. *CCH Common Market Reporter*, Vol.1, page 1641, paragraph 2014.

56. See, e.g., CCH *Common Market Reporter*, Vol. 1, page 1642, paragraph 2014.

57. Written question No. 519/72, *CCH Common Market Reporter*, Vol. 2, page 9242, paragraph 9563.

IX. THE EUROPEAN COAL AND STEEL COMMUNITY

General. The members of the European Coal and Steel Community (ECSC) are the original members of the EEC (Germany, Belgium, France, Italy, Luxembourg and The Netherlands) and Denmark, Great Britain and Ireland and the ECSC has similar and largely common institutions: an Assembly which is supervisory in character, a Council which is political and legislative on a derivative level, a Commission (originally called the "High Authority") which is administrative, a Consultative Committee to assist the Commission, and a Court of Justice which is, of course, judicial in character. The mission of the ECSC, in relation to coal and steel, is, for present purposes, basically the same as that of the EEC in other sectors of the economy (Article 2). Article 3 sets out how the resources of the Community are to be marshalled to achieve the mission. The matters which are recognized as incompatible with the Community, and therefore prohibited, include "restrictive practices tending towards the division or exploitation of the market" (Article 4). The measures to be taken to accomplish the mission of the Community include assuring "the establishment, the maintenance and the observance of normal conditions of competition" (Article 5). The function of the Court is "to ensure the rule of law in the interpretation and application of the present Treaty [of Paris, which is the constitution of the ECSC] and of the regulations for its execution" (Article 31). Against this background - an Assembly to supervise, a Council to legislate, a Commission to administer and enforce with a Consultative Committee to advise it and a Court of Justice to interpret and assure due process - the more important and relevant Articles of the Paris Treaty will now be described briefly.

Article 60 (Pricing practices)[58]

Article 60 prohibits, generally, pricing practices which are contrary to the spirit of the Treaty. It particularizes (a) unfair competitive practices and (b) discriminatory practices. As to the former, it further particularizes "purely temporary or purely local price reductions" tending towards the acquisition of a monopoly position within the Common Market. The discriminatory practices affected are those which involve, within the Common Market, "the application by a seller of unequal conditions in the case of comparable transactions, especially according to the nationality of the buyer". To achieve the purpose of these prohibitions, price lists and other conditions of sale must be made public to the extent and in the manner prescribed by the Commission and if the Commission finds that a "choice of point" upon which a firm bases its price lists is "abnormal", and in particular if it makes possible the evasion of certain principles laid down to govern the basing point system of pricing, the Commission is to make an appropriate recommendation to the firm concerned.

Article 65 (Restrictive agreements, etc.)

Article 65 corresponds in its essentials with Article 85 of the Rome Treaty. All agreements etc. tending directly or indirectly to prevent, restrict or distort the normal operation of competition within the Common Market are proscribed and, within this generalization, the following agreements etc. are particularized: (a) price fixing agreements, (b) agreements to restrict or control production, technical development or capital investment, and (c) agreements to allocate markets, products, customers or sources of supply. Nevertheless the Commission is to authorize, in respect of specified products, specialization and joint buying and selling agreements if it finds

(a) that such an agreement will contribute to a substantial improvement in the production or distribution of a product, (b) that the agreement is essential to achieve such results and not more restrictive than is necessary for such purpose and (c) that such agreement is not capable of giving the parties thereto the power to control the prices, or to control or limit the production or marketing, of a substantial part of the product in question within the Common Market or of withdrawing it from effective competition by other firms within that Market. Fines and periodic penalty payments are provided in respect of prohibited agreements, such fines or penalties not to exceed twice the turnover of the products which are the subject of the agreement; but if the purpose thereof is to restrict production, technical development or capital investment, such maximum may be raised to 10 per cent of the annual turnover of the parties in the case of fines and 20 per cent of daily turnover in the case of periodic penalty payments.

Article 66 (Mergers etc.)

Under Article 66 prior authorization by the Commission is required for "any transaction which would have in itself the direct or indirect effect of bringing about a concentration within the territories [the relevant territories of the ECSC]... involving enterprises one at least of which is [engaged in coal or steel production within such territories or certain aspects of distribution]..." The requirement applies whether the transaction is carried out individually or collectively and "whether it is effected by merger, acquisition of shares or assets, loan, contract, or any other means of control." Authorization is to be given if the Commission finds that the concentration will not entail the power:

- to determine prices, to control or restrict production or distribution, or to prevent the maintenance of effective competition in a substantial part of the market for such products; or
- to evade the rules of competition as they result from the execution of this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets. In arriving at its decision . . . the [Commission] shall take account of the size of enterprises of the same kind existing in the Community, as far as it finds this justified to avoid or correct the disadvantages resulting from an inequality in the conditions of competition.

The [Commission] may make such an authorization subject to any conditions which it considers appropriate for the purpose of this section.

The Commission may exempt from the requirement of prior authorization types of transactions which, by reason of small size, or the kind of concentration brought about, qualify for exemption under the criteria above-mentioned.

If a concentration occurs which the Commission finds to have been in contravention of the requirement to obtain authorization, but the Commission also finds it to fulfil the conditions for exemption, it will approve the concentration, subject to the payment of a fine by "the persons who have acquired or regrouped the rights or assets in question"; and if the fine is not paid, the Commission shall apply the measures prescribed for concentrations found to be illegal. If a concentration occurs which does not satisfy the conditions for authorization, the Commission is to declare the concentration illegal and "order the

separation of the enterprises or assets illegally concentrated or the cessation of common control, as well as any other action which it considers appropriate to re-establish the independent operation of the enterprises or assets in question and to restore normal conditions of competition". Notwithstanding Article 33 (see page 110) the Court of Justice, upon an appeal, is competent to judge "whether the operation effected is a concentration" within the meaning of Article 66. The Commission is empowered to take "such temporary measures as it may consider necessary to safeguard the interests of competing enterprises and of third parties, and to prevent any action which might impede the execution of its decisions"; and an appeal does not suspend the operation of any such temporary measure unless the Court otherwise decides. Decisions of the Commission are enforceable by daily fines and by suspension, by the Commission, of the exercise of the rights of the offending parties attaching to the assets illegally acquired; and the Commission may

> . . .bring about the designation by judicial authorities of a receiver-administrator for these assets; organize the forced sale of such assets in conditions preserving the legitimate interests of their proprietors; annul, with respect to physical or legal persons who have acquired the rights or assets in question by the effect of the illegal transaction, the acts, decisions, resolutions, or deliberations of the directing bodies of enterprises subject to an irregularly established control.

The Commission may address to public or private enterprises which, "in law or in fact", have or acquire a dominant position "which protects them from effective competition in a substantial part of the common market, any recommendations required to prevent the use of such position for purposes

contrary to those of" the Treaty; and, failing the implementation of such a recommendation, the Commission may, after consultation with the interested government, "fix the prices and conditions of sale to be applied by the enterprise in question, or draw up production or delivery programmes which it must file".

Articles 67 - 70 (Other aspects of competition)

Article 67 relates to the control or mitigation of the effects of measures taken by individual Member States which may provoke serious disequilibrium by impairing the conditions of competition in the ECSC market. Articles 68 and 69 have for their purpose the prevention of abnormally low wages being resorted to for competitive purposes and to the prevention of job discrimination based on nationality as between Member States. Article 70 is designed to prevent discriminations, based on origin or destination, in rates and other conditions of transportation and the control of national subventions.

Article 33 (Appeals)

An appeal lies to the Court of Justice at the instance of a Member State, the Council, an individual enterprise or an association of enterprises from a decision or recommendation of the Commission on grounds of (a) lack of legal competence, (b) major violation of procedure, (c) violation of the Treaty or any rule of law relating to its application or (d) abuse of power; but the Court "may not review the ... evaluation of the situation, based on economic facts and circumstances" which led to the decision or recommendation, except where the Commission "is alleged to have abused its powers or to have clearly misinterpreted" the Treaty or any such rule of application. An appeal by an enterprise

or association lies, not only against a decision or recommendation affecting it, but also against a general recommendation alleged to involve an abuse of power affecting the enterprise or association.

Articles 34 to 40 (Where Appeal Allowed)

Article 34, which is of particular interest, provides that, where the Court annuls a decision or recommendation of the Commission, the matter is to be remanded to the Commission, and if the Court has found that the Commission has been at fault, whereby direct and special injury has been caused, the Commission must take such measures as are within its competence to assure redress and "to the extent necessary, must grant reasonable damages"; and if the Commission fails in such obligations the aggrieved party may look to the Court for damages. Article 40 provides that the Court may award damages against the Commission where injury has resulted from an official fault of the Commission which has not been redressed by the latter; and that it may similarly award damages against a servant of the Commission, and in the case of non-payment by the servant, assess the damages against the Commission.

The Geitling case[59] is fairly representative of decisions of the Commission (formerly known in this context as the "High Authority") in the area of restrictive agreements and particularly interesting because of its discussion of the expressions "power to determine prices", "control of marketing" and "substantial part of the products in question within the common market" which occur in the Treaty of Paris.

IX. FOOTNOTES

58. Too ready an acceptance of literal resemblances between the competition provisions of the Rome and Paris Treaties may be misleading as to actual philosophies pervading the two régimes. The current recession in the Community steel industry is referred to in an article in the Economist for October 11, 1975: "Time to blow the whistle on the EEC's steel giants?" (page 43). The article originates in Brussels and describes pressures believed to be being brought to bear on the EEC antitrust Commissioner to dissuade the Commission from actively investigating allegations of market sharing and price fixing in areas of the industry that are subject to the Treaty of Rome. To quote from the article: "Any inquiry, it is said, would expose a basic contradiction between the Treaties of Rome and Paris. The Treaty of Rome, in its competition clauses, is so committed to capitalist doctrine that its authors could be accused of plagiarising Adam Smith. But the Treaty of Paris, in the words of an EEC trustbuster, 'is a license for steel and coal cartels'".

59. "Geitling" Ruhrkohlen-Verkaufs - Ct.m.b.h. v. The High Authority, Case No. 13/60, July 17, 1962 C.M.L.R. 113, Recueil 165.

X. SUMMARY

The EEC has sought, by converting the national markets of its nine Member-States into one international market, to advance the living standards of its inhabitants. This is to be achieved by increasing the mobility of resources throughout the larger area and by permitting production and distribution facilities to adapt to the opportunities for achieving economies of scale and specialization that are offered by that larger area. Competition rules have been written into the constitution of the EEC to ensure that the new and wider market structure will not be fragmented and its potential efficiencies defeated by the persistence of old or the creation of other restraints. The competition rules which are contained in Articles 85 and 86, are directed against joint price determination, market sharing and other anti-competitive practices on the part of industry groupings and against abuses of a dominant position by an individual firm, whenever such practices or abuses affect trade between Member States and their effect or intent is to prevent, restrict or otherwise distort competition within the Community. The Court of Justice of the Community is the final arbiter in the interpretation of the Community competition rules, whether an issue concerning them arises in a private action in a national court or whether such issue is raised directly in that Court in an appeal from a decision of the Commission which is the administrative enforcer of such rules. In interpreting the competition rules the Court has recourse not only to Articles 85 and 86 but also to the form and intent of any other Articles to the content of which such rules have relevance, for example, the Articles that provide for the free movement of goods between Member States. It may be fairly said that the Court interprets such rules in the light of the public policy in favour of competition and against private restrictions

which is expressed or implied throughout the entire constitution of the EEC which is basically the Treaty of Rome. Not only private individuals but also State commercial enterprises and, indeed, Member States themselves are subject to the rules, save for a general exemption for State schemes to the extent, and the extent only, that restrictions are essential to such State schemes as are permissible under the Treaty.

Having regard to the wording of Article 85 (see Appendix A), an essential ingredient of an offence under that Article is that the impugned behaviour must affect trade between Member States; it is not sufficient that it affect trade <u>within</u> a Member State (intra-State trade) or trade between a Member State and a country outside the Community (extra-Community trade). However, the Commission and the Court have matched the ingenuity of the corresponding institutions of the United States in finding an inter-State component, as, for example, where an agreement or agreements between a producer or producers and users, within a single Member State, are so prevalent that the import of a competing product from another Member State is prevented or restricted. Having regard to the expressed object of Article 85, which is to prevent inter-State trade from being (adversely) affected, it is not surprising that the Court, and the Commission acting within what it believes to be parameters set by the Court, has established a low threshold of intervention, ordinarily held to be reached when inter-State trade can be shown to be "appreciably" or "significantly" affected.[60]

Another direction in which the Court may be said to have contributed, jurisprudentially, to the development of the competition policy relates to its approach to "agreements". Canadian law, as proposed by Bill C-2, presently before Parliament (as of December 6, 1975),[61] regards market restriction, tied selling and exclusive dealing as essentially <u>imposed</u> upon one party by another party,

while under the EEC jurisprudence these practices are considered as arising from agreements expressly or tacitly, voluntarily or reluctantly, accepted by both parties, and, as such, caught in the embrace of Article 85.

Another concept, introduced by the Treaty and refined by the Court, is that of the "concerted practice" which, as well as an agreement, may affect trade and be punishable under Article 85. The requirements as to joint behaviour of this expression are met, under the jurisprudence, where a number of firms, falling short of making an agreement, so conduct themselves that competition is replaced by tacit but not committed cooperation, as e.g. where a group of firms, without any communication necessarily passing among them, so consistently followed a price leader and made public their price intentions that all firms could so interpret each others past behaviour and predict each others future behaviour that it was obvious that they were following a deliberately accepted non-competitive pattern. The concept of "concerted practice" is similar to but not exactly the same as the U.S. concept of "parallel action" in that the former probably demands a subtle degree of understanding that may not be required under the latter concept.

Although, in Article 85 cases, the Commission, in the first instance, and in the second instance, the Court of Justice, have concerned themselves with market definition, both quantitatively as regards market shares and qualitatively as regards substitutability, they have not attempted to set quantitative bench marks of intervention, and this, of course, is as expected, having regard to the interference-with-inter-State-trade orientation of Article 85. Nevertheless the Regulations of the Commission as well as its guide Notices, have indicated from time to time, for the peace of mind of the business community as well as the convenience of the Commis-

sion, minimum quantitative thresholds below which the Commission will not intervene. As in the Canadian practice undertaken by the Director of Investitation and Research, under the Combines Investigation Act, under the name "Program of Compliance", the Commission has adopted a policy of informal advice and recommendation in respect of practices contemplated or even in existence although, again as in the Canadian practice, a group is not permitted to continue in a forbidden pattern until detected upon the initiative of a complainant or the Commission itself and then throw itself upon the mercy of the Commission with promises of reform. Combines that are "caught out" are subject to exemplary monetary penalties at the hands of the Commission, subject to review by the Court.

A point to note in connection with the guides made available by the Commission in written form is that they are not entirely negative, in the sense of warning against proscribed conduct and indicating some of the parameters of danger. The role of the Community agencies, and in particular the Commission, is not only to deter from and punish collusive behaviour which is forbidden. The purpose of the Community is the optimum allocation of resources, and in cases where the Commission believes that efficiency lies in the direction of specialization or co-operation, with little effect upon competition, or without net disadvantage from a restriction of competition, the tone and intent of the guides is to encourage co-operation, as may be seen from the summaries of guide Notices that are given in this Paper. While this policy, in the nature of things, has been conspicuous on the part of the Commission, such slight indications as exist in respect of the attitude of the Court point in the same direction.

The point has already been made that all the Articles of the Treaty that are directly or indi-

rectly relevant to competition are themselves inter-related and this is particularly true, in the light of the jurisprudence, of Articles 85 and 86. The latter is intended to prevent, on the part of firms in dominant positions, the same effects as the former forbids by way of joint action. This theory of inter-relationship has been pressed very far by the Commission with the support of the Court. Read alone, Article 86 would appear to be strictly a behavioural Article, concerned with the actual conduct of a firm in a dominant position and not in itself concerned with the manner in which that position was achieved. The jurisprudence and the practice have nevertheless converted it into an instrument of sorts for dealing with mergers, which are not mentioned as such in the Treaty. The line of reasoning has been that it could never have been intended that a firm could achieve, with impunity, the results that were forbidden to a group of firms by agreement, and hence Article 86 is to be regarded as forbidding at least the extension or entrenchment of a dominant position if not its very creation. Economically the logic of the Court appears to be impeccable; and legally, coming from the Court of last resort, it is unassailable. Pending the enactment of an Article dealing expressly with mergers the Commission has indicated a strong intention to press Article 86 to the maximum as an instrument for controlling mergers.

At the same time the Commission has recognized that Article 86 is a weak anti-merger provision and it has placed before the Council a proposal for a Regulation to deal specifically with mergers. The proposal was made in 1973 and appears to be meeting heavy weather in the politically-oriented Council by reason of the conflicting, or at least varying, views entertained about mergers by the Member States. In the meanwhile it appears to be making the best it can of Article 86. In reply to a recent question in the EEC Assembly (or Parliament) as to a rumoured merger in the auto-

mobile tire industry the Commission replied in terms of what it could or could not do under Article 86. In the meantime, i.e. pending the enactment of merger provisions, both the Court and the Commission have seized upon opportunities to decry the rate of merger concentrations within the Community and to point out the futility of putting down those forms of concentrated activity which are brought about by firms that maintain their legal and in other respects their economic autonomy while not prescribing specific rules against permanent structural concentrations, by way of mergers, which may achieve the same deleterious results as those of the looser combinations. This apparently very real concern over the problem of merger concentration is all the more persuasive, coming as it does from one or more institutions which are demonstrably in favour of concentrations where it can reasonably be demonstrated that they are unilateral, bilateral or multi-lateral adaptations to the challenges and opportunities of a larger available market and the technologies of large scale production or distribution units.

Although Article 86 has become conspicuous on account of its application to merger situations, it must be kept in mind that its primary threat is against <u>any</u> abuse of a dominant position insofar as such abuse may affect trade between Member States. Thus it would appear that conduct of the following and like categories is reviewable under the Article: the conduct of the owner of an intellectual or industrial property right who exploits it so as to prevent effective competition; the conduct of the supplier of a scarce primary product who discontinues the supply to secondary manufacturers so as to exclude them from the market; the charging of conspicuously high or discriminatory prices by a person who, by reason of legislation or his own circumstances, finds himself in a

monopoly or near monopoly position in a particular spatial market or a product market narrowly defined. Where abuse is established under Article 86 the Commission has seen fit to make specific orders as to supply or price and has been expressly supported by the court in respect at least of the former.

The organization of the Community institutions that relate to the enforcement of competition raise several interesting points. There is something to be said for an institution like the Commission, which unites the capacities of informer, investigator, prosecutor, judge of first instance and enforcer, that it appears not to have suffered loss of respect from an even more divergent and apparently conflicting combination of functions than that which led to the separation of functions of the Canadian Combines Commissioner in 1952 and the re-assignment of the basic functions of enforcer and judge to a Director for the first and an independent Restrictive Trade Practices Commission for the second. One cannot refrain from congratulating the Commission for the objectivity it has apparently been able to maintain, side by side with an energetic enforcement policy, while at the same time not endorsing the arrangement or suggesting that it be emulated. A quite independent Court, not reluctant itself to take on a review of economic analysis, along with a high regard for due process, and a sophisticated Bar always insistent upon strict regard for formal procedure, have apparently presented an acceptable balance against an institution that a duality of functions might otherwise have led astray. The terms of reference of the Court, upon an appeal in a case arising under Article 85 or 86, are to review the matter "on grounds of lack of competence, infringement of an essential procedural

requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." Acting upon such terms of reference the Court has not hesitated to quash a decision of the Commission on the ground of inadequate market analysis, and this means that our Lady of the Law while not professing to be herself an economist has nevertheless asserted a claim to economic literacy, a quality that should of course be expected of a superior court or at least a superior court of last resort. It is interesting to note that the corresponding terms of the Court in cases arising under the Treaty of Paris establishing the European Coal and Steel Community (ECSC) are more restricted: to entertain an appeal "on the grounds of lack of legal competence, major violations of procedure, violation of the Treaty or of any rule of law relating to its application, or abuse of power. However, the court may not review the ... [Commission's] evaluation of the situation, based on economic facts and circumstances, which led to ... [the decision] ... except where the ... [Commission] is alleged to have abused its powers or to have clearly misinterpreted" the Treaty or any such rule.

It is interesting to note that the Commission is not only subject to costs, if it loses a case before the Court, but that it may also be made an ordinary defendant and sued for damages by a private individual as, e.g. were it to publish misleading information which induced such individual to act to his financial detriment.

The Commission is ordinarily characterized as an administrative rather than a judicial or even semi-judicial body but, as such, it is subject to the unwritten rules that have developed in the area of administrative law. Among other things it must inform any party before it as to

the issues in such a way as to afford him a meaningful opportunity to be heard and it must give sufficient reasons for its decision to allow the Court, upon an appeal, to appraise and pass judgment upon the issues before the Court.

In review, and subject to any strictures of constitutional law which it is not the function of this Paper to discuss, and in most cases without attempting to assign merit or lack of merit, the following are aspects of the competition law and procedure of the EEC which the draftsmen of changes in the Canadian system should at least be aware of and, in some cases, be prepared to consider for possible adoption in principle or detail:

1. The proposed merger Regulation (see pages 71-74). It is clear that any competition policy which comes down upon loose combinations and fails to incorporate merger provisions of equal strength is completely illogical and even self-defeating in the area it does cover.

2. The dominant firm concept, with a comparatively low threshold for intervention against abuse, and with particular reference, perhaps, to price discrimination (see Article 86 in Appendix A).

3. The specialization Regulation (see pages 44-45).

4. The principle of a frankly administrative agency with authority to determine contraventions and assign penalties. It is unlikely that such an institution would find favour in Canada.

5. Appeals upon grounds wider than are contained in section 28 of the Federal Court Act to a court capable of making and instructed to make superseding judgments requiring economic literacy but not, for want of a better expression, economic expertise in depth.

6. A regulation-making power of a subsidiary character for the rounding out and application of the rules contained in the governing Act.

7. A negative clearance power falling short of formal approval or allowance of an agreement, merger or other practice (see page 38).

8. A somewhat structured or formally recognized authority to issue guide Notices which would be more general and less committing than negative clearances (see pages 50-57).

9. A general rule to the effect that only those activities of regulated industries and federal and provincial monopolies and other undertakings, which are clearly essential to the expressed purpose of such a monopoly, industry or undertaking, are exempt from the prohibitions contained in the Combines Investigation Act.

10. Rules circumscribing the exercise or extension of rights in respect of industrial or intellectual property (see pages 78-86).

11. Adherence to the rule of law, all the relevant factors being written into the legislation and no political "over-ride".

12. Integration of the competition rules into over-all economic, industrial and social policy whereby the Director or the Restrictive Trade Practices Commission under the Combines Investigation Act could refer to as relevant and call in aid of interpretation the provisions of other Acts relating to a situation before the Director or the Commission.

13. Restriction or special application of the competition rules to inter-provincial and external trade. Such restriction (to inter-State trade) in the Rome Treaty is logical, in a sense, having regard to the purpose of the Treaty and the purpose of Articles 85 and 86 to prevent national boundaries being replaced by privately imposed boundaries. Such restriction is illogical, however, in the wider context of election for a private enterprise or free market economy.

14. (Related to 2 above) A semi-regulatory authority, in the Restrictive Trade Practices Commission, over dominant firms and oligopolistic industries, in respect of prices and other matters, which, on an *ad hoc* basis, would compensate for market force deficiencies but avoid the rigidities and inhibition of such competitive behaviour as remains possible, that tend to be inherent in complete regulation. (See, e.g., the *United Brands* case[62] in Appendix B.)

15. The drawing together, under one agency, divided if necessary into various panels, of all the regulatory functions that are compatible, of such present agencies as the Restrictive Trade Practices Commission, the Foreign Investment Review Agency, the Tariff Board, the Anti-dumping Tribunal, the Canadian Transport Commission etc., in order to achieve co-ordination of such regulation of various sectors of the economy as is necessary. (Consider, in this respect, the overall functions of the institutions of the EEC (Council, Commission, etc.) and the wide variety of their functions in relation to all economic aspects of the European Community including the Community policies relating to competition, free movement of goods and services, agriculture, transportation, and the like.)

X. FOOTNOTES

60. It will be noted that in several of the Commission's Notices described in this Paper, (beginning at page 50), quantitative thresholds of intervention have been established and in several of the cases described in Appendix II the proportion of a market affected has been quantitatively fixed. As would be expected, however, no general attempt has been made to quantify the degree of interference with competition that will attract the application of Article 85 and it remains for the Commission, and ultimately the Court of Justice, to determine, on the facts of the individual case, whether such interference should be disregarded as _de minimis_ or held to come within such concepts as "perceptibly restricts" (65); a position on the relevant market that cannot be described as "weak" (25); "prevent the maintenance of _effective_ competition" (emphasis supplied) (43); "the seriousness of the restrictions on competition" (85); "appreciable effects on market conditions" or exceeding a tendency to "impair... competition only slightly" (19); and the like.

61. Bill C-2, _op. cit._, note 5.

62. Press release from the Commission of the European Communities, No. IP (75) 2. Brussels, December 6, 1974. Commission Decision of December 19, 1974. _Official Journal_ of the European Communities, No. L29, February 3, 1975, page 14.

APPENDIX A

Articles 85 and 86 of the Treaty of Rome

Article 85

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 86

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

APPENDIX B

Illustrative Selected Cases from the Competition Jurisprudence of the EEC and ECSC.

Interpretations of expressions "power to determine prices", "control of marketing" and "substantial part" in Article 65 of the Paris Treaty (ECSC)

The Geitling case[63]

This was an appeal from a decision of the High Authority of the European Coal and Steel Community refusing approval pursuant to Article 65 of the Paris Treaty of the following arrangement.

The appellant Company (the "Company") comprised 38 colliery companies operating the great majority of mines in the Ruhr valley, three existing joint selling agencies and the "S.a.r.l. Ruhr Kohletreuhand". The 38 companies in 1961 disposed of 80 per cent of their products within the Federal Republic of Germany, which represented 73.1 per cent of the total consumption there of coal. Sales in the Republic represented 59 per cent of total sales of coal in the Common Market and 48 per cent for coke coal. The constitution of the Company provided that it should have the exclusive right of disposing of the quantities of coal and coal products "declared" by members. The High Authority (now the Commission) had held that the establishment of this single, unified sales system was incompatible with the ECSC Treaty, and refused its approval under Article 65 of the Paris Treaty. The appellants submitted, *inter alia*, that there had been misinterpretation of the following expressions in Article 65: "power to determine prices", "control of marketing" and "a substantial part of the products in question

within the common market".

As to the first expression, the Court concluded that the internal effect of the joint selling arrangement involved a certain power to determine prices, the extent thereof depending on the volume of production under its control. As to coal, there was no doubt in relation to quantum, although the position might be affected by competition from fuel oil. The Court also agreed that the market was one of imperfect competition or oligopoly, but concluded that, if the fuel market was an oligopoly, offering participants the opportunity of real economic strategy, it must necessarily confer a certain power to determine prices. Also, the ECSC Treaty took into consideration the technical and commercial evolution which constantly augmented the size of the industrial units, thus giving the markets in coal and steel an oligopolistic character. Once it had been determined that the joint sales organization involved a certain power to determine prices, the only remaining question was whether that power applied to a substantial proportion of the products involved, and this point is related to the third expression, discussed below.

As to the second expression, the Court concluded that, in transferring to the sales organization the sole rights over the channels of supply, there was thereby given to it the power to direct, according to its own sales policy, the tonnage for which it was responsible. The control exercised by the sales agency on the policy of price alignment also gave the agency the opportunity, by re-directing supplies at will (even in comparatively small amounts), of affecting profoundly the supplies from competitors, and thereby reinforced the control of its own supply. It was also impossible not to see, in this power to control supplies, a certain power of control over exports within the meaning of Article 65 (2) (c).

As to the third expression, even allowing for certain corrections, the quantities involved were an important fraction of the total supplies of the market and as such were under the direct or indirect control of the sales organization, and it followed that the powers of the latter extended to a substantial proportion of the products in question in the market, and the word "substantial" certainly extended to an important fraction. Such errors as there might be in the findings of fact, e.g., a possible difference between 47 per cent and 53 per cent as the percentage of coal supplied within the Federal Republic of Germany, was too trifling to call seriously in question the particular decision made upon the contested figures.

No proposition is postulated on the basis of this case, it being described only by way of illustration of ECSC jurisprudence and the application of Article 65 of the Paris Treaty which established the European Coal and Steel Community.

Exclusive selling agreements

The De Geus case [64]

Bosch, a German firm, granted Van Rijn, a Dutch firm, the exclusive right to sell Bosch's refrigeration appliances in the Netherlands and, to protect Van Rijn's exclusive selling right, made the following a term of its sales contracts with other German buyers: "Bosch products may not be exported abroad, directly or indirectly, unless there is a written authorization on our part." Another Dutch firm, De Geus, imported from Germany such products, purchased from German firms who were bound by the above-mentioned stipulation. Bosch & Van Rijn sued De Geus for an injunction and damages and De Geus defended *inter alia*, on the ground of Article 85.

The Court of Justice, having disposed of several procedural points, then proceeded to consider the question referred to it by the national court, on its merits: "whether the export prohibition imposed by ... Bosch ... upon its clients and accepted under contract, is null by virtue of Article 85... as regards exportation to the Netherlands."

The Court having decided that Article 85 was in effect from the date of coming into force of the Treaty, went on to say that the question could not be considered merely one of interpretation of the Treaty, because, since the context of the prohibition was not known to the Court, the Court could not decide "upon the issue" without a previous examination, which examination was not within the jurisdiction of the Court under Article 177.

The Court therefore confined itself to the finding "that it might be concluded that the export prohibitions... come under the definition of Article 85, first paragraph, and, in particular, that they are covered in the phrase: 'agreements... which are liable to affect trade between Member States...'". The Court went on to say that it could not be categorically conceded that Articles 4 and 5 of Regulation 17 (see pages 38-40) should be applied so as to exempt the prohibitions from notification and thus render them valid.

Function of Court of Justice;
form of reference;
exclusive selling agreements;
factors to be considered

The Minière case[65]

In an action for a breach of an exclusive distribution contract between a German firm (MBU) and a French firm (L.T.M.) the defendant (L.T.M.) put in issue Article 85 of the Treaty and the French Court hearing the matter referred two questions to the Court of Justice. The questions need not be stated because the answers by the Court of Justice stand on their own feet.

Before the Court of Justice, L.T.M. took the preliminary objection that, under guise of a question of interpretation the national Court had put questions of application over which the national Court had sole jurisdiction. On this preliminary point as to the jurisdiction of the Court of Justice the Court ruled that Article 177 enabled the Court to render a policy issue ruling on the interpretation and validity of the Community measures and enabled any court of a Member State to refer any such question of interpretation and validity to the Court of Justice "if it considers that a decision on the question is essential to enable it to render judgment". Thus it is the national Court that will render judgment and not the Court of Justice and the latter cannot involve itself in the evaluation of the grounds on the basis of which the national Court recognized this need. Although the Court of Justice does not have jurisdiction to apply the Treaty to a specific case, it will not stand upon the form of the question but will sift out from the elements of the case those questions of interpretation or validity which are within its jurisdiction; and the need for arriving at a proper interpretation of the provisions in issue justifies a statement by the national Court as to the legal framework within which the requested interpretation must be placed. "The Court of Justice thus may extract from the points of law outlined by the ... [national Court] the specific information necessary to understand the questions submitted and to propose a suitable answer." The Court of Justice then proceeded to a consideration of the merits and made

the following self-explanatory ruling:

In answer to the first question:

Contracts that include a clause "granting an exclusive selling right" do not, solely because of their nature, contain the elements constituting incompatibility with the Common Market as provided in Article 85, paragraph 1, of the Treaty.

A contract of this type, considered by itself, can, however, because of a specific factual situation or because of a particular clause, contain these elements when the following conditions are fulfilled:

(1) The agreement including a clause "granting an exclusive selling right" must have been concluded between enterprises, regardless of the position of each enterprise at any of the stages of the economic process.

(2) It must, in order to come within the field of application of Article 85, on the basis of all the objective elements of law and of fact, be such as to give rise to a reasonable expectation that it might directly or indirectly, actually or potentially, influence the flow of trade between Member States that is likely to hamper the realization of a single market between those States.

In this respect, the agreement should be examined primarily with a view to determining whether it is apt to partition the market for certain products between the Member States.

(3) It must have the object or effect of preventing, restricting, or distorting competition.

In considering the object of the exclusive licensing agreement, this finding must be based directly on the contract as a whole or on its individual clauses.

If it does not fulfill these conditions, the effects of the agreement must then be considered, and such examination must lead to a finding that it prevents or perceptibly restricts or distorts competition.

In this respect, it is necessary to examine, in particular, the strictness of the clauses granting exclusive rights, the nature and quantity of the products covered by the agreement, the position of the licensor and the licensee on the market of the products concerned, and the number of participants in the agreement or possibly in other agreements that are part of the same network.

In answer to the second question:

The nullity provided for in Article 85, paragraph 2, applies to all the provisions of a contract that are incompatible with Article 85, paragraph 1.

The consequences of this nullity for all other parts of the agreement are not governed by Community law; ....

The Court of Justice ordered that the costs of the reference abide the result of the action in the Court of Appeal of Paris.

Decisions of Commission
to be reasoned

The Cimenteries case[66]

Since decisions of the Commission are appealable to the Court of Justice, it almost goes without saying that the Commission in making a decision must give reasons. The point was expressly covered, however, in the <u>Cimenteries</u> case. Article 15 of Regulation No. 17 provides that notified agreements and agreements existing prior to the date prescribed for notification do not make the participants liable for fines for violations of Article 85 (see page 126); but it also provides that such exemption "shall not apply once the Commission has informed the enterprises concerned that after a preliminary examination it considers that the conditions of Article 85, paragraph 1 of the Treaty have been fulfilled and that the application of Article 85, paragraph 3, is not warranted". In this case the notification to the enterprises contained only a summary of the agreement followed by the remark that the Commission "has come to the conclusion" that paragraph 1 must be applied and that the application of paragraph 3 "is not justified". The Court said that this was a "decision" and, though only a provisional measure, must show its reasons "with sufficient clarity to permit the Court... and all the parties concerned to determine that the pertinent provisions have been correctly applied." Thus, even though the effect of the decision was only to remove the agreement in question from an exempt category and lay it open henceforth to attack under Article 85 (third paragraph), the decision had to be a reasoned one which, on appeal, the Court would be in a position to review. In the result, the Court annulled the decision of the Commission and awarded costs against it.

Exclusive distributorship agreements;
<u>due process</u>; to be considered in overall
economic and legal context;
trade mark rights; objective nature
of benefits to the public; parallel imports;
<u>character of Commission</u>

The Consten case[67]

Grundig, a German firm, entered into an agreement with Consten, a French firm, whereby Consten would for an indefinite time, have the exclusive right to distribute Grundig radios, television sets, tape recorders and dictating machines in metropolitan France, the Saar and Corsica; Consten agreed to purchase up to a minimum proportion of the total exported from Germany to the contract territory; Consten agreed to send in regularly the required advance orders; Consten agreed to provide adequate advertising, set up a repair shop stocked with spare parts and furnish guarantee customer service; and Consten agreed not to handle competing products nor to make deliveries to or for other countries. The latter obligation had also been imposed by Grundig on its licensees in other countries as well as on Grundig wholesalers at home, and Grundig also agreed to leave the resale to Consten and not to supply other persons in the contract territory. For use in the distribution of Grundig products, Consten registered in France, under its own name, the Grundig trade mark "GINT" (Grundig International), carried by all Grundig products including those sold in Germany. The trade mark was to be attached only to Grundig products. Costen was to transfer this trade mark to Grundig or to cancel it when Consten ceased to be Grundig's exclusive dealer.

UNEF, another French company, during the currency of these arrangements bought Grundig products from German dealers who delivered them in spite of Grundig's prohibition, and UNEF sold these products to French retailers at prices lower than those asked by Consten. Consten thereupon brought two actions against UNEF, one for unfair competition and the other for infringement of the trade mark. (The basis of the second action requires no explanation; the second such action lies in France and certain other Member States under the general commercial law, on the facts above

recited relating to the circumvention of the exclusive distribution arrangement.) Consten succeeded in the lower Court in the first action and when UNEF appealed, the Court of Appeals decided to suspend the proceedings until the Commission had ruled on a request by UNEF for the Commission to find an infringement of Article 85 by Grundig and Consten because of the exclusive distributorship arrangement and the related agreement regarding the trade mark. Grundig immediately registered the exclusive agreements with Consten and its other licensees with the Commission. Ruling on the Grundig-Consten contract, the Commission found that such contract and the related agreement concerning the trade mark infringed Article 85 (second paragraph), refused an exemption under Article 85 (third paragraph) and under Article 85 (third paragraph) ordered Grundig and Consten "to refrain from any and all measures tending to hinder or impede the acquisition by third enterprises, as they wish, from wholesalers or retailers established in the EEC, of the products covered by the contract for the purpose or reselling them in the contract territory". Grundig and Consten appealed against the Commission to the Court of Justice and the Court allowed Italy and France to intervene in support of the plaintiffs (Grundig and Consten) and UNEF and Leisener, another French firm against whom Consten had brought a similar action, to intervene in support of the defendant (the Commission). Plaintiffs asked the Court of Justice to annul the decision of the Commission and award costs against the defendant; and defendant asked the Court to reject the appeal and award costs against the plaintiffs. Italy asked the Court to allow the appeals, authorize the use of Italian for its briefs and pleadings, and for costs. Leisener and UNEF asked the Court to allow the appeals and for their costs. Germany asked the Court to rule, in effect, for the plaintiffs and for costs.

The Court of Justice first disposed of several procedural objections. Consten alleged a violation of a substantial procedural rule in that the Commission's judgment, as published in the Official Journal of the EEC, was designated "directive", whereas a directive cannot, under the EEC system, be addressed to individuals. The Court replied that the text sent to the plaintiffs had referred to itself as a "decision", the apt word used by the Treaty, and dismissed the plea as being without merit. Consten and Grundig claimed violation of due process in that the Commission had failed to communicate to them all the points in the record, particularly with respect to two notes from French and German authorities which the Commission took into account in its decision. The Court said that proceedings before the Commission were administrative in character; that the parties must be given an opportunity to meet the complaints which the Commission might raise against them; that the parties must therefore be informed of the facts on which the complaints were based; that it was not necessary, however, that the entire record be made known to them; that a note of the Commission supplied to the plaintiffs had contained all the facts necessary to establish what points were taken into consideration; and that the decision of the Commission contained no complaints which had not been the subject of the proceedings. Consten also alleged that the decision further violated due process in that it did not take into account the principal pleas made in the proceedings before the Commission, particularly the requests for further investigation. "In an administrative proceeding of this type", the Court said, "the administrative body is not bound to give reasons for rejecting the pleas of the parties." The Court held that due process had not been violated.

The German Government also pleaded violation of due process in that the finding of an infringement should have appeared only in the Commission's

statement of reasons and not in the ruling of the decision. The Court said that nothing turned on the location of the finding in the Commission's decision, and proceeded to deal with the merits in the manner summarized below.

Consten and Grundig argued that Article 85 applied only to horizontal agreements and Italy argued that exclusive distributorships are not "agreements between enterprises" within the meaning of Article 85, since the parties are not on an equal footing, and freedom of competition in regard to such contracts can only be protected under Article 86. The Court said that the wording of neither Article pointed to a distinction of their respective fields "according to the economic function of the parties to the contract." Article 85 applies generally to all agreements that distort competition within the Common Market and makes no distinction between such agreements according to whether they are between competitors operating at different levels, and not on an equal footing. The Court said:

> This is particularly true because otherwise the parties could, through such an agreement, by preventing or limiting the competition of third parties with respect to the products, attempt to establish or to ensure for themselves an unjustified advantage to the detriment of the consumer or the user, which would be contrary to the general objectives of Article 85.

and the Court continued:

> Thus it is possible that, even though an agreement does not lead to an abuse of a dominant position, an agreement between enterprises operating at different economic levels may be liable to affect trade between

> Member States and at the same time have the object or effect of preventing, restricting, or distorting competition and thus fall within the prohibition of Article 85, paragraph 1.

The Court went on to say, in effect, that it was pointless to argue that the result sought to have been achieved by Grundig could have been achieved by integrating distribution into its own enterprise. The two situations were not only legally distinguishable, they also did not necessarily have the same effect. (The Court did not elaborate this point.) "The EEC Treaty,... designed to remove the barriers between the States and which... strongly combats their reappearance, cannot permit enterprises to create new barriers of this type."

Plaintiffs and Germany argued that, failing to interpret correctly the concept, in Article 85, of "agreements liable to affect trade between Member States", the Commission had therefore failed also to prove that trade would have been more active without the agreement. The purpose of that concept, said the Court, "is to separate the respective fields of application of community law and of national law in the matter of cartel law". It is only to the extent that an agreement may affect inter-State trade that Article 85 operates. The real question, therefore, is "whether the agreement directly or indirectly, actually or potentially, is capable of jeopardizing the freedom of trade between Member States in such a manner as to prejudice the realization of the objectives of a single market between the States." The fact that an agreement helps to increase considerably the volume of trade between Member States is not sufficient to preclude the possibility that it can "affect" (the word used in Article 85) trade in the manner above stated. The fact that the contract prevents all enterprises except Consten

from importing Grundig products into France and Consten from re-exporting them to other countries in the Common Market, as well as the limitations that might result for third parties from Consten's registration in France of the GINT trade mark, are sufficient to fulfil the conditions of Article 85.

The plaintiffs and Germany had argued that the Commission had limited its examination to Grundig products and had failed to understand the concept, implied in Article 85, of competition from different brands, and had thus failed to apply the Article reasonably (the "rule of reason"); that vertical exclusive distributorship agreements should not be merely presumed to damage competition; and that in fact the agreement in question had increased competition between brands. The Court said that the principle of the freedom of competition applied to all economic levels and all aspects of competition and that an agreement that restricted competition between distributors should not escape because it might strengthen competition between producers, and the Court continued:

> Furthermore, for purposes of applying Article 85, paragraph 1, it is not necessary to take into consideration the actual effects of an agreement where its purpose is to prevent, restrict, or distort competition. Consequently, the fact that the Commission's decision did not analyze the effects of the agreement on competition between similar products of different brands is not in itself a defect in the decision.

The Court then reviewed the essential aspects of the agreement, noting the "absolute territorial protection" which it in effect granted on the basis of French commercial law, including trade mark law, and said:

> In its decision, the defendant rightfully took into account the entire distribution system established by Grundig. In order to evaluate the impact of a contractual agreement, the contract must be placed in the economic and legal context within which it was concluded. This procedure cannot be considered an intrusion into legal transactions or legal relationships that were not the subject of the proceedings before the Commission.

The situation found to exist, said the Court, isolates the French market and makes possible the application of prices in which there is no effective competition, and it continued:

> ... Furthermore, competition between producers generally loses its effectiveness as producers become more successful in their efforts to clearly differentiate their brands from other brands. Because distribution costs account for a substantial part of the total cost price, it appears important that competition between dealers should also be promoted. Dealers are spurred to greater efforts by competition between distributors of goods of the same brand. Because the agreement is designed to isolate the French market for Grundig products and to artificially maintain separate national markets within the Community for products of a widely distributed brand, it distorts competition within the Common Market. That is why the Commission's decision properly held that the agreement violates Article 85, paragraph 1. It does not depend upon any further economic considerations (difference between prices in France and prices in Germany, general application of the Commission's findings to a particular type of appliance, or amount of the costs borne by Consten), nor upon the

> correctness of the criteria used by the Commission in making its comparisons between the situation on the French market and the situation on the German market, nor upon possible favorable effects of the agreement in other respects, since, in view of the above restraints on competition, none of these circumstances in the framework of Article 85, paragraph 1, can lead to a different solution.

The Court held, nevertheless, that the Commission's decision should be amended "to the extent that it extends, without sufficient reasons, the nullity of Article 85 ... to all parts of the agreement."

The plaintiff had alleged that the Commission had wrongfully prohibited it from exercising trade mark rights stemming from national law to prevent "parallel imports", or, in other words, that the effects upon competition sprang, not from the agreement, but from the effects of French trade mark law. The Court distinguished between such rights _per se_ and the manner of exercising them, saying that:

> While under French law Consten, by registering the GINT trademark, became the original holder of the rights flowing from it, it could do so only because of the agreement with Grundig. Such an agreement can be subject to the prohibition of Article 85, paragraph 1. Such prohibition would have no effect if Consten could continue to use the trademark for the same purpose as that intended by the agreement that was considered to be illegal.

The Court then rejected an argument, by the plaintiffs and Germany, that the Commission's decision was bad because it was aimed at the whole Grundig distribution system and therefore affected

persons that had not been heard. The Court said that it was generally desirable for the Commission to extend its enquiries as far as possible to all persons who might be affected by its decisions, but that the interest of other Grundig dealers in the validity of the agreement between Grundig and Consten did not entitle them to claim an automatic right to be invited to the proceedings.

The plaintiffs, supported by Germany, argued that all the conditions required for the exemption of the agreement under Article 85 (third paragraph) were present, but exemption was denied. The Court replied that it was for the enterprises concerned to prove that the conditions necessary to exemption were present. The Court said that the enterprises had the right to an appropriate examination by the Commission of their requests for exemption; the Commission could not confine itself to simply asking for proof, "but must contribute to the establishment of relevant facts and circumstances in accordance with administrative principles and the means available to it." The Court continued:

> On the other hand, the exercise of the Commission's powers necessarily involves complex evaluations of the economic situation. The judicial review of these evaluations must respect that character by limiting itself to an examination of the relevance of the facts and of the legal inferences drawn from them in accordance with the principles of applicable law. Such review will be exercised first of all on the reasoning of the decisions which must, for purposes of these evaluations, specify the facts and the considerations on which they are based.

The Commission's decision declared that the main reason for refusing exemption was the fact that the condition set forth in Article 83 (third paragraph) (a) was not fulfilled. (Paragraph (a)

provides that, to be eligible for exemption, an agreement must not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of" the objectives of improving the production or distribution of goods or the promotion of technical or economic progress.) Germany complained that the decision did not answer the question as to whether the provisions of the agreement for advance orders and the guarantee and after-sale services, whose benefits the Commission recognized, could be retained in the absence of absolute territorial protection. The Court noted that the decision had admitted only theoretically such benefits; it had then considered whether the improvement in the distribution of the goods through "the exclusive distributorship agreement" could be achieved if parallel imports had been allowed; and after examining plaintiff's arguments on the importance of the advance order, market survey, guarantee and after-sale provisions had concluded that no other reason in defence of the need for absolute territorial protection had been submitted or detected. The Court then replied that the question of improvement of production or distribution must be answered in the light of the spirit of Article 85; advantages to the parties to such an agreement were undeniable but did not necessarily contribute improvement as contemplated by the Article; that improvement must be, not subjective as relating to the parties thereto but objective as offering substantial objective advantages capable of compensating for the detriment to competition which the agreement engendered. The specific interests of the parties are not to be confused with the objective improvements envisaged by the Treaty. In evaluating the relative importance of the various parts of the agreement the Commission also had to evaluate their effect in relation to an objectively ascertainable improvement in the production and distribution of the products and to determine whether the resulting advantage was enough to make the restrictions on competition appear essential.

As to the argument that unless parallel imports were prohibited the exclusive distributor would be unable to send in advance orders, the Court replied that prediction of sales possibilities always involves some uncertainty, which permitting parallel imports might increase, but such risks are inherent in any trading activity and cannot justify a special protection.

It was also argued that the Commission did not examine, on the basis of concrete facts, the possibility of furnishing the guarantee, and customer service without absolute territorial protection; and did not consider the importance to the Grundig brand of the proper performance of such services for all Grundig equipment offered for sale; that the liberalization of parallel imports would force Consten to refuse such services for equipment imported by competitors who did not furnish such services to an adequate extent; and that such refusal would also be contrary to the interests of consumers. The Court replied that, as to the free guarantee service, the decision had stated that a buyer could ordinarily claim a right to such a guarantee from the actual supplier and then only upon the conditions agreed upon; that the fear of harm to the Grundig reputation due to insufficient guarantee service did not, therefore, appear justified; that UNEF furnished such services in a manner that did not appear to have harmed the Grundig reputation; that the plaintiff could inform customers, through advertising, of the advantage offered by Grundig's official distribution network; and that it was not true, therefore, that Consten's advertising would be of equal benefit to parallel importers.

Plaintiffs also complained that the Commission had not examined whether absolute territorial protection was not essential for the recovery of Consten's costs of introducing Grundig products on the French market. The Court said that the Commis-

sion was under no obligation to examine, on its own initiative, a point that had not been raised before it; that plaintiffs were in effect arguing that without absolute territorial protection Consten would not have accepted a distributorship; but that, in any event, their point was unrelated to the improvements in distribution referred to in Article 85 (third paragraph).

Plaintiff Grundig also maintained that without absolute territorial protection the sole distributor would not be prepared to assume the costs of surveying the market, since his efforts would benefit parallel importers. The Court accepted the position of the Commission, that the main purpose of surveys was to discover what technical improvements were desired by French consumers, and pointed out that Consten, in its capacity of Grundig's only recognized distributor in France, was the only one to receive equipment especially adapted to the French market.

In the result there was a partial annullment of the Commission's decision and the Court did not award costs to any of the parties. The Court ruled that the decision of the Commission should be annulled insofar as it held that all, rather than only the offending parts, of the contract in question was an infringement of Article 85, and charged all parties with their own costs.

Exclusive buying agreements

The Brasserie de Haecht case[68]

In the Brasserie de Haecht case the Brewery sued a tavern keeper in a Belgium court for breach of an agreement to buy exclusively from the Brewery. The tavern keeper defended on the ground that the agreement was null and void under Article 85 of the Treaty. The Belgium court referred to the Court

of Justice the question whether, in considering such defence, the Court must view the agreement in isolation or whether it might take into consideration the prevalence of this type of agreement imposed by a small number of Belgian Brewers upon a very large percentage of the beverage purveyors. The Court of Justice said:

> The existence of similar contracts is a circumstance which, together with other circumstances, can as a whole create the economic and legal context within which the contract must be weighed. While this situation must therefore be taken into consideration, it cannot alone be considered to be determinative. It is, in fact, one of several elements to be considered in deciding whether competition may be distorted and trade between Member States likely to be impaired.

Industrial or intellectual property rights - when subject to rules of competition - patents

The Parke, Davis case[69]

Parke, Davis had a Dutch patent on processes for preparation of an antibiotic drug. Defendant put into distribution or resold, in the Netherlands, quantities of the same drug which it obtained from Italy where there are no drug patents. Parke, Davis brought suit against defendant for patent infringement, seeking damages and an injunction, alleging not only a right but an obligation thus to intervene because of a license it had granted to a licensee in the Netherlands to utilize the patent. The Netherlands Court referred to the Court of Justice two questions: in effect, do Articles 85 and 86, possibly in conjunction with

Articles 36* and 222*, affect Parke, Davis' patent rights; and would the answer to the foregoing question be otherwise if the price in Holland of the drug sold under the patent were higher than that of the drug as imported without regard to the patent. The Court of Justice said, noting the effect of Article 36, that "the exercise of the rights flowing from a patent granted under the laws of a Member State does not in itself violate the rules of competition set forth in the Treaty." As to Article 85:

> A patent of invention, viewed by itself and apart from any agreement of which it might be the subject, does not belong in any of these categories, but results from a legal status granted by a State for products meeting certain criteria, and thus avoids the elements of contract or concert required by Article 85, paragraph 1.

On the other hand, Article 85 could be applicable to the utilization of a patent by enterprises acting in concert, of which there was no appropriate evidence. As to Article 86, there are three necessary elements of an infraction: existence of a dominant position, abusive exploitation thereof and the possibility of inter-Member State trade being affected thereby. Also, pending the intended unification of the national laws relating to industrial property rights, "the existence of a patent right ... depends at present on domestic legislation, only the use of such right could be subject to the rules of Community law, in the event such use were to contribute to a dominant position whose abusive exploitation is likely to affect trade between Member States". The Court therefore declared that:

* These sections safeguard, respectively, industrial and commercial property and existing systems and incidences of ownership.

> The existence of rights granted by a Member State to the holder of a patent of invention is not affected by the prohibition set forth in Articles 85, paragraph 1, and 86 of the Treaty.
>
> The exercise of such rights cannot in itself be subject either to Article 85, paragraph 1, in the absence of an agreement, decision, or concerted practice covered by such provision, or to Article 86, in the absence of an abusive exploitation of a dominant position.
>
> The fact that the selling price of a patented product is higher than that of a non-patented product coming from another Member State does not necessarily constitute an abuse;
>
> ...

Market sharing; rule of reason or de minimis

The Marine Paints case[70]

Eighteen medium-sized producers of marine paints, five of whom were located each in a separate Member State and each of the others in a different outside country, entered into an agreement whereby each would manufacture and distribute, within his national market and under a common trade mark, a marine paint of the same uniform quality. The firms were to share know-how including commercial experience and each was to provide a continuous supply, maintain adequate inventory and also provide after-sale service. The participants were not precluded from handling other lines of marine paint. At the instance of the Commission there was dropped from the arrangement a condition that no participant could export the paint in question into the national territory of another participant without the latter's consent. The

arrangement as finally considered by the Commission retained or contained a prohibition against a participant setting up a manufacturing plant in the national territory of another participant and against taking on sub-contracts from a non-member. Participants undertook to accept quality control and not to divulge to outside persons technical and commercial information acquired as participants. Participants holding relevant patents were to give priority to other participants. If a participant sold in the national market of another participant, the latter was entitled to a commission; or the former might turn the order over to the latter and himself receive a commission. Each participant remained free to compete, subject to the foregoing, in respect of price and service. The participants did not, among them, account for a substantial portion of the over-all market in which they operated.

The Commission was satisfied that the arrangement conferred a benefit upon consumers in that it is advantageous to users of marine paint to stay with a particular paint and to be able to obtain it whenever a new coat comes to be applied, because paint applied over identical paint is more durable. Although the arrangement, as modified, still in certain respects restricted competition, the Commission found that in another respect it fostered more effective competition with larger producers through the creation of a wide-spread distribution system for a specific line of marine paint; that it conferred benefits upon consumers of the nature above described and that the restrictions did not go beyond what were essential to attain the objectives of the arrangement by inducing each participant's concentration of sales effort and other investment in his national market; and the Commission therefore exempted the arrangement for a period of five years[71] at the end of which it would re-examine it to determine whether or not it still came within the terms of the exemp-

tions provided by Article 85 (third paragraph).

It would appear that three courses are possible in approaching the issue of agreements of the kind examined in the Marine Paints case. The agreements could be proscribed outright on the theory that there is so little to be said for them that they do not, upon economic balance, on the basis of their predominant characteristics, tendencies and results, warrant the cost of individual examination; or at the other extreme they could be subjected individually to minute analysis; or some middle course could be taken whereby such an agreement could be judged on the basis of a formula that involved certain general assumptions, short of a *per se* rule, but left the door open to some plausible justifications that would be subject to continuing periodic review. It is, of course, easier to state the principle of the last mentioned alternative than to bring it to terms with legislative requirements of a reasonably precise and objective character. By its interpretation and application of Article 85 (third paragraph) in the Marine Paints and other cases however, the Commission has apparently, from the second and third above-mentioned options which were open to it, opted for the third mentioned.

The entering into such an agreement as was considered in the Marine Paints case obviously involves a very large number or range of executive decisions as to what is to be gained, what is to be lost, what is the optimum mix of the gained and lost, through what precise mechanics the results are to be sought and so forth. Could one or more of the participants have achieved or approximated the public benefits claimed on its own initiative and at what comparable cost? Could it have anticipated at what ports the ships for which its paint was initially purchased would lay up for repainting and arrange to have its paint available

there at the appropriate time? Could it have devised an attractive tying contract under which it would arrange to make its paint available at any port in the future upon reasonable notice? To what extent would unilateral action involve it in a general disclosure of private technical and trade information for which disclosure (the divestiture of an actual asset) it would not be able to recoup itself? In what respects would cooperation in one area inhibit, having regard to human and business behaviour, innovation on its part in that as well as other areas. And so forth. In short the Commission, were it to adopt the second alternative above mentioned, would have to think each step through as if it were a business man making business decisions. Of course the business man, who was accustomed in many respects to act intuitively and usually correctly and who saw reflected in the decisions of the Commission the kind of questions he had been coping with, would be somewhat in the position of the Bourgeois Gentilhomme who discovered to his surprise that all his life he had been speaking "prose".[72]

In effect it would appear that the Commission saw before it, on the part of a group of relatively small operators, an innovative and sensible-looking arrangement that conferred presumably plausible benefits upon a section of the public without affecting competition substantially, and, though finding that it definitely involved certain of the practices proscribed by Article 85 (first paragraph) ("may effect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition" in that they "...fix...trading conditions...", or "share markets"), applied a "rule of reason" or "_de minimis_" and found, also, that it contributed "to improving the production or distribution of goods or to promoting technical or economic progress, while

allowing consumers a fair share of the resulting benefit" and that it did not either "impose... restrictions which are not indispensible to the attainment" of its objectives or "afford... the possibility of eliminating competition in respect of a substantial part of the product market".

It should of course be noted that this was a decision of the Commission which never reached the Court of Justice.

Relationship of Community law to national law

The Walt Wilhelm case [73]

In an order issued on November 28, 1967 The Bundeskartellamt (German Cartel Authority) at Berlin imposed fines on Wilhelm *et al*. under the German Law Against Restraints of Competition. The complaint was that Wilhelm *et al*. had agreed among themselves and with other producers in other Member States and in other countries upon an eight per cent increase in the price of aniline dye to become effective on October 16, 1967. On May 5, 1967 the Commission had commenced proceedings against four of the above mentioned firms and others in the Community and elsewhere that produced aniline. The price increase of October 10, 1967 was one of the matters involved in such proceedings. These proceedings might lead to the imposition of fines against the various enterprises on the ground that this increase and earlier increases indicated concerted practices within the meaning of Article 85 (first paragraph) of the Treaty. In the German proceedings the defendants claimed that the Bundeskartellamt had no jurisdiction to hear an action involving a violation that was at the same time the subject of parallel proceedings before the Commission under Article 85. The German court sought from the Court of Justice a ruling as to whether it was compatible with

Article 85 and the other provisions and principles of Community law to apply accumulatively for the same set of facts the prohibitions contained in the German law where the Commission had already formally asserted its jurisdiction; or whether the risk of dual penalties precluded such cumulative proceedings.

The Court of Justice said that Community cartel law and national cartel law took different approaches to cartel matters, Article 85 of the Treaty viewing them from the standpoint of inter-Member State trade and the national law viewing them within a national context, so that the same cartel could, in principle, be the subject of dual proceedings. This view was supported, the Court noted, by Article 87 (second paragraph) (e) of the Treaty which gives the Council the power to define the relationship between the national laws and the competition laws of the Community, so that, in principle, the national cartel authorities may also take action regarding situations that are likely to be subject of a Community decision. But this is so only insofar as the uniform application throughout the Community of the Community laws is not jeopardized. The Court then pointed out that the function, in this context, of the Treaty, is not entirely negative - to remove obstacles - but also in a measure positive - to exercise some positive though indirect action to promote a harmonious development of economic activity throughout the Community. Unfortunately the Court did not elaborate these ideas but went on to say that:

> Article 87, paragraph 2 (e), by giving a Community institution the power to define the relationship between national law and Community law on competition, confirms the preeminence of Community law. The EEC Treaty established a separate legal order, to be

> incorporated into the legal systems of the Member States and followed by their courts. To recognize a right of the Member States to adopt or retain measures that are likely to jeopardize the benefits of the Treaty would be contrary to the nature of such a system.

"Thus", said the Court, "any conflicts between the Community rule and the national rules governing cartels must be resolved by applying the principle of preeminence of the Community rule." Until a rule adopted under Article 87 provides to the contrary, the national authorities may proceed under national law upon the same facts as the Commission is proceeding on under Community law, "provided, however, that such application of the national law does not prejudice the full and uniform application of Community law or the effect of the measures taken to implement it."

As to cumulative penalties, this possibility would follow from the foregoing, but general considerations of equity as, e.g., those expressed in Article 9 (2) of the ECSC Treaty, should require that in determining any penalty, previous relevant penalties should be taken into account. The formal, relevant judgment of the Court was as follows:

> Until such time as a regulation issued pursuant to Article 87, paragraph 2 (c), of the Treaty provides otherwise, the national authorities may intervene against a cartel under their internal law, even where an examination of the position of such cartel from the standpoint of the Community rules is pending before the Commission, provided, however, that such application of national law does not prejudice the full and uniform application of Community law or the effect of measures taken to implement it.

Several comments may be made about this judgment. In the first place the net result - that national laws must give way to Community laws - would seem to be inevitable. In the second place, when does a conflict between two systems occur? If, for example, the Community law, as written and as refined in Regulation or case law, is to the effect that a price-fixing arrangement that covers 70 per cent of a given Community market is contrary to Article 85 but one that affects only 20 per cent of such market is not, obviously there is no conflict of principle if the proportion of a Member State market affected is 50 per cent and or even 15 per cent and the national law makes the arrangement illegal within such Member State. Thus the State law is less tolerant than the Community law but does not conflict with such law but merely goes farther in the same direction. But the Treaty, as well as being negative on the subject of restrictions, is positive on the side of rationalizations that bring real benefits which enhance productivity and share the results with consumers. If the application of the Community law were to sanction such an arrangement under Article 85 (third paragraph) but the application of a national law were to condemn it because of its effect upon competition, there would obviously be a real conflict in principle between the two systems and the Community law, presumably, would be read to the effect that the arrangement had not merely been excused but had been approbated by the application of the Community law. A variation of this model can be envisaged where the arrangement, on the basis of its effect throughout the entire Community, was benign but in a particular Member State malignant; presumably the effects of the arrangement in each Member State would have been taken into account and the exemption granted notwithstanding the effects of the arrangement within the Member State. That the relationship between the two systems continues a problem is indicated by the following paragraph from the

Fourth Report on Competition Policy of the Community which was published in April of the current year (1975):

> Problem areas in the relationship between Community competition rules and national laws were closely reviewed at a conference with government experts. The Member States share the view of the Commission that it is not opportune at the present time to deal with this relationship by regulation and that double prosecution and the dangers of conflicting decisions should be avoided through systematic consultations between the Commission and the competent national authorities.

Role of Court of Justice;
de minimis rule

The Völk case[74]

Upon a request to the Court of Justice for a preliminary ruling on a point of interpretation of the Treaty arising in a private action, the role of the Court is not to decide the issue as between the parties but, rather, to guide the domestic court to a proper decision by indicating the principles of interpretation involved. Thus, in the Völk case, Völk, as proprietor of a German firm, sued Vervaecke, a Belgium firm, for breach of an alleged contract whereby, *inter alia*, Vervaecke contracted to buy a minimum number of Völk's washer-dryer machines for resale in Belgium and Luxembourg and Völk undertook to protect Vervaecke by preventing Völk machines from entering the Belgium and Luxembourg markets except through Vervaecke. The Belgium Court asked:

> In deciding the question of whether the contract of September 15, 1963, together with the riders of January 1, 1964, and March

> 11, 1964, is prohibited under Article 85, paragraph 1, of the EEC Treaty, is the deciding factor the share of the market that plaintiff actually has or is seeking to acquire in the Member States of the European Economic Community in particular in Belgium and Luxembourg, the sales territory within which defendant has absolute protection?

The Court of Justice noted that it did not have the power, on an application under Article 177 (a) of the Treaty, to apply the Treaty to a specific case; it must extract from the referral decision only those questions that concern the interpretation of the Treaty. The Court therefore advised:

> It is possible that even where there is absolute territorial protection, an exclusive distributorship agreement does not, in view of the weak position that the parties have on the market on the products in question within the protected territory, come within the prohibition contained in Article 85, paragraph 1, of the EEC Treaty.

<u>Intra-State agreements; possible spill-over into import or export markets</u>

<u>The Bilger Brewery case</u>[75]

Article 4 of Regulation No. 17 excuses from notification to the Commission, agreements where enterprises of only one Member State take part and such agreements involve neither imports nor exports between Member States.

The judgment of the Court of Appeal in the <u>Bilger Brewery</u> case makes a somewhat puzzling distinction between the effect of the words "may affect trade between Member States" in Article 85

of the Treaty and the words "involve neither imports nor exports between Member States" in Article 4 of Regulation 17.

A German brewery sued a German restauranteur in a German court for breach of contract to buy the restaurants' requirements of beer exclusively from the Brewery. The restauranteur raised the issue of illegality under Article 85. The German Court of Appeal asked the Court of Justice to decide whether a beer supply contract between two enterprises of one Member State by which an innkeeper agreed to buy exclusively from the Brewery all the beer required in his establishments involved imports and exports between Member States. The Court said:

> Such a contract, considered with similar contracts that bind a significant number of retailers and a few manufacturers of the same Member State, may, in an individual case, be capable of affecting trade between Member States; however, these practices are nevertheless exempt from registration pursuant to Article 4, paragraph 2, of Regulation No. 17 if they involve neither imports nor exports between Member States. It is, therefore, possible that the same agreement, which involves "neither imports nor exports between Member States" within the meaning of that provision, nevertheless "affects trade between Member States" within the meaning of Article 85, paragraph 1, of the Treaty. The words "... involve imports or exports..." thus have a narrower meaning than the words "...affect trade between Member States."

Exclusive supply contracts covering goods that do not need to cross national frontiers certainly do not involve imports or exports. Therefore, such contracts come

within Article 4, paragraph 2 (i), of Regulation No. 17 and thus are exempt from the registration provided for in Article 4, paragraph 1, and Article 5, paragraph 1, of that regulation.

Price fixing; concerted practices; extraterritorial reach; economic entity

The Dyestuffs case[76]

On the basis of information supplied by trade associations of users of dyestuffs, the Commission investigated and found three uniform price increases. Between January 7 and January 20, 1964, prices for most aniline dyes were raised by 15 per cent in Italy, the Netherlands, Belgium and Luxembourg. This increase was extended to Germany on January 1, 1965. On that same date, nearly all the producers in Germany as well as in the countries already affected by the 1964 increase set a uniform 10 per cent increase for dyestuffs and pigments that were not covered by the first increase. Finally, on October 16, 1967, prices for all dyestuffs were raised by nearly all the producers in Germany, the Netherlands, Belgium and Luxembourg by 8 per cent, and by 12 per cent in France, but there was no increase in Italy.

The Commission then initiated proceedings against the enterprises it believed took part in a concerted practice to fix prices in violation of Article 85 of the Treaty, these comprising four Italian producers, four German producers, one French producer, one Dutch producer, four Swiss producers, two English producers and one U.S. producer, and their various subsidiaries and representatives within the Common Market. It found the charge substantiated and imposed fines of 50,000 units of account each on one of the English and the four German participants, the French participant and three of the Swiss parti-

cipants and a fine of 40,000 units of account on one of the Italian participants. The English participant, ICI, applied to the Court to annul the Commission's decision.

The Commission maintained before the Court that in order for an arrangement in concert to be present it was not necessary that the parties have a common plan for a certain market conduct; that it was sufficient if they kept each other informed of their intended conduct so that each participant could plan its actions in the expectation that its competitors would adopt parallel conduct.

Plaintiff argued that the Commission's decision was based on an insufficient analysis of the market and on an incorrect conception of the idea of a concerted practice, since it equated a concerted practice with the consciously parallel conduct of the participants in an oligopoly, even where the conduct resulted from autonomous decisions of individual enterprises determined by objective economic needs, and specifically by the need to improve the unsatisfactory profitability of dyestuffs production.

The Court said, in respect of this argument:

> Article 85, in distinguishing the term "concerted practices" from the terms "agreements between enterprises" and "decision of associations of enterprises" attempts to show that the prohibition covers a form of coordination between enterprises that has not yet reached the point where there is a contract in the true sense of the word but which, in practice, consciously substitutes a practical cooperation for the risks of competition. ...If a parallelism in conduct cannot in and of itself be considered the same as a concerted practice, it can be a decisive indica-

> tion of it where it leads to competitive conditions that are not, considering the nature of the goods, the size and number of the enterprises concerned, and the extent of the market, normal market conditions. This is the case where parallel conduct makes it possible for the enterprises to achieve price stability at a level other than that which would have resulted from competition and to strengthen the acquired market positions to the detriment of really free trade in the Common Market and the freedom of consumers to select their suppliers.

The Court went on to say, in effect, that the question of whether there is a concerted arrangement can only be decided by looking at the evidence against the background of the particular market in question, and it proceeded to examine the dyestuffs market. Here ten producers, generally large in size and often producing other chemicals, accounted for 80 per cent of the market. They had very different production and cost structures which made it difficult for each to learn his competitor's costs. The total number of dyestuffs was very high, with each enterprise producing over a thousand items. Interchangeability was relatively good for standard products but could be low or nil in the case of specialties. In the case of the latter the market tended to be oligopolistic. Because of the relatively slight role the price of dyestuffs plays in the price of the end product, demand elasticity was limited. On the other hand, overall demand was rising steadily with each producer trying to share in such growth. In the Community there were five isolated markets with varying price levels unexplainable by differences in costs and expenses borne by producers in the various countries. The establishment of the Common Market had brought about no reductions in such differences. Each national market exhibited characteristics of oligopoly, with a price leader evident in the majority of them.

After listing several other characteristics or practices, the Court proceeded to analyze the 1964, 1965 and 1967 price increases. The last mentioned had been preceded by a meeting attended by all but one of the producers named in the proceedings and at this meeting, on 18 August 1967, one producer had announced its intention to raise prices by 8 per cent as of 16 October 1967. Two other firms also announced their intention to raise prices and by mid-September all the enterprises had announced an 8 per cent increase (12 per cent in France) to take effect on 16 October in all the countries save Italy. Here an Italian participant declined to raise its prices but declared its willingness to go along with the prices on two other markets although on dates different from the 16 October. "These three successive price increases", said the Court, "viewed together, reveal a progressive cooperation between the enterprises concerned." Through such advance announcements the enterprises eliminated any uncertainty as to their future conduct. By their behaviour they made the relevant markets "transparent" with respect to rate of increases. In the result it could be said that the conduct of the enterprises was designed to eliminate the risks of competition and uncertainty as to the reactions of competitors not acting in concert and to replace them with a cooperation and this constituted a concerted practice prohibited by Article 85 of the Treaty.

Plaintiff (Imperial Chemical Industries Ltd.), domiciled outside the Community, argued that the Commission was not competent to impose a fine upon it for actions outside the Community solely because these actions had effects within the Common Market. The Court said that, by availing itself of its power of direction over its subsidiaries within the Common Market, ICI was able to apply its decisions within that Market, and this brought it within the intent of Article 85.

Plaintiff also argued that this conduct was that of its subsidiaries and not its own. The Court said:

> The fact that the subsidiary has its own legal personality does not serve to rule out the possibility that its conduct is attributable to the parent company. This could be the case where the subsidiary, even though it has its own legal personality, does not independently determine its own market behavior but essentially follows the instructions given it by the parent company. If the subsidiary does not in fact have autonomy in determining its course of conduct on the market, the prohibition of Article 85, paragraph 1, is inapplicable to the relationship between it and the parent company, with which it forms an economic unity. Since an affiliated group so structured forms a unity, the parent company can, under certain circumstances, be held responsible for the actions of the subsidiary.

Plaintiff in fact controlled its subsidiaries in the Community, holding all or a majority of their capital stocks and it used its power to give instructions on the occasions of the three price increases. "Under these circumstances, the separation between parent firm and subsidiaries arising out of the fact that each has a distinct legal personality does not prevent their conduct on the market from being viewed as a unity for purposes of the application of the rules of competition. For this reason, it is the plaintiff that brought about the concerted practice within the Common Market."

<u>Exercise of industrial or intellectual property rights - when an abuse; trade marks; dominant position</u>

The Sirena case[77]

Sirena sued Eda, both being Italian firms, for distributing "Prep" in Italy where Sirena held the trade mark. Sirena claimed its right to the trade mark on several grounds but it must be taken, for purposes of the judgment, that Sirena acquired it under agreement with the American firm, Mark Allen, from whom the German manufacturer of the Prep distributed by defendant also acquired the right in Germany. The Italian Court referred to the Court of Justice two questions: Are Articles 85 and 86 applicable to the effects resulting from an agreement antedating the Treaty; and do the Articles prevent the owner of a trade mark legally registered in one Member State from enforcing the absolute right so implied to prohibit third parties from importing from other Community countries the article carrying the same trade mark legally affixed from the beginning. The judgment of the Court of Justice was to the following effect.

Until the national laws of Member States relative to industrial property rights are standardized, the national character of the protection afforded such rights could create obstacles both to the free movement of trade marked goods and to the Community competition system. Article 36 of the Treaty permits relevant restrictions, but subject to them not being used as a means of artitrary discrimination or as a disguised restriction on inter-Member State trade. The exercise of trade mark rights is particularly apt to contribute to the partitioning of markets and thus the impairment of the free movement of goods between Member States which is essential to the Common Market. The statutory trade mark right does not, however, in itself connote the ingredient of agreement necessary to the application of Article 85. When the right is exercised by virtue of an assignment to others in one or

more Member States, it must be determined in each case whether the exercise of such right leads to a situation within Article 85. Such a situation could result from agreements between owners of a trade mark and their successors in title which agreements enable them to prevent imports from Member States. If the concurrent assignment of a trade mark to several users results in the restoration of impenetrable frontiers between Member States, this could impair trade between Member States and distort competition in the Community. It would be otherwise if the agreements were such that the generalized right to the trade mark rights on the Community level was reconciled with the conditions of competition and market unity essential to the Common Market and protected by Article 85. This Article applies if the importation of products from different Member States, carrying the same trade mark, is prevented by invoking the trade mark right where the owners acquired it under agreements between them or with third parties. The fact that national law makes such rights subject to elements of law or fact, other than the agreements, such as registration or continuous use, does not prevent the applicability of Article 85. Where cartel arrangements predate the Treaty, the latter applies to their effects after that date.

As to Article 86, it requires, for application, three elements: dominant position, abusive exploitation and the possibility of impairment of inter-Member State trade. The first element is not established by the fact alone that the owner of a trade mark is in a position to prevent third parties from distributing, in the territory of a Member State, products bearing the same mark; it is necessary, rather, to show that the owner has power to prevent the maintenance of effective competition in a substantial part of the relevant market. The existence and position of producers of substitute goods must be considered in this

connection. Moreover, the price level of a product is not necessarily indicative of the abuse of a dominant position, although it can be a decisive indication where "it is particularly high and is not justified by the facts".

The Court therefore ruled that:

1. (a) Article 85 of the Treaty is applicable where the trademark right is invoked to prohibit imports of products coming from other Member States and carrying the same trademark, if the owners of this trademark acquired the mark or the right to use it under agreements between them or agreements with third parties.

   (b) Where the above-mentioned agreements were entered into prior to the date on which the EEC Treaty entered into force, it is necessary and sufficient that they continue to produce their effects after that date.

2. (a) The owner of a trademark does not hold a dominant position within the meaning of Article 86 of the Treaty solely by reason of the fact that he is in a position to prohibit third parties from distributing, in the territory of a Member State, products carrying the same mark. It is necessary in addition that he have the power to prevent the maintenance of effective competition in a substantial part of the relevant market.

   (b) The price level of a product is not in itself necessarily indicative of an abuse of a dominant position within

> the meaning of Article 86, but it can be a decisive indication where it is particularly high and is not justified by the facts.

As far as trade marks are concerned, it is clear that the trade marked goods do not necessarily constitute a separate product market, and this, of course, makes sense. Patent rights, however, are different in character and _semble_ it should be easier to establish that a patented article, in a given case but not universally, constitutes a separate product market. Even in the case of a trade mark it might, _semble_, possess so firm a grip over a spatial market as to constitute, also, a separate product market. It would follow that each class of industrial or intellectual property right has to be examined in the light of its peculiar characteristics.

Noteworthy is the distinction, in importance, which the Court, in the _Sirena_ case, suggested between trade marks and other industrial property rights, pejorative to the former: "trade mark rights are to be distinguished from other industrial or commercial property rights in that the latter mostly aim to protect objects of a greater importance and of a more considerable value than in the case of trade mark rights." It is suggested (by the present writer) that trade mark rights are not truly industrial rights in the same sense that are patent, industrial design and copy right rights; while the latter three relate to the creation of tangible things, the former, trade marks, are often a device for selling, to another person, a share of the control over a market which the first person has obtained by advertising.

Exercise of industrial or intellectual property rights; copyright; dominant position.

The Deutsche Grammophon case[78]

In the Deutsche Grammophon case the German manufacturer of phonograph records endeavoured on the strength of his German copyright, by seeking an injunction in a German court, to prevent the re-import of records which had been exported to another Member State and which were being sold in Germany at less than the resale prices which the manufacturer's recognized distributors in Germany had agreed with the manufacturer to maintain. The injunction was sought against the price cutting firm to prevent it from selling the records in Germany. The German court submitted to the Court of Justice questions concerning the interpretation of Articles 5, 85 and 86 of the Treaty. (Under Article 5, Member States undertook to "abstain from any measure which could jeopardize the attainment of the objectives of" the Treaty.)

The first question, as interpreted by the Court of Justice, was whether it would be contrary to Articles 5 and 85 of the Treaty to interpret the German law relating to copyright and the like

> ... as meaning that a manufacturer of sound recordings can invoke its exclusive right to distribute them in order to prohibit the sale in the Federal Republic of Germany of sound recordings which the manufacturer itself delivered to its French subsidiary, which, although legally autonomous, is economically wholly dependent upon it.

The Court of Justice rephrased the question as being

> ... whether the exclusive right to sell the protected goods, which the manufacturer of sound recordings has under a national law, can, without jeopardizing the Community rule, prevent the sale on the domestic territory of products normally sold in the territory

of another Member State by that manufacturer or with its consent. The Court of Justice is being asked to determine, from Article 5, paragraph 2, or from Article 85, paragraph 1, of the Treaty, the content and meaning of the applicable Community rule.

The second question, as interpreted by the Court of Justice, was

> ... whether the manufacturer of sound recordings is abusing its exclusive right to distribute the protected products where the imposed selling price is, in the national territory, higher than the price of the native product reimported from another Member State and where the performers on the recordings were bound to the producer of sound recordings under exclusive contracts. Since this question uses the words "abuses its right," it concerns the abuse of a dominant position within the meaning of Article 86 of the Treaty.

The Court went on to remark that Article 3 (f) provides for the establishment of a system that ensures that competition in the Common Market is not distorted. Where Article 36 allows certain exemptions of restrictions upon the free movement of goods, it describes them specifically and stipulates that such exceptions are not to be used "as a means of arbitrary discrimination nor as a disguised restriction on trade between Member States". Article 36 expressly permits exception for the protection of industrial property. Assuming rights akin to copyright are included, "it nevertheless follows from that Article that while the Treaty does not affect the existence of the rights recognized by the laws of a Member State in the matter of industrial property, the exercise of such rights can, however, be subject to the prohibitions set forth in the Treaty".

The Court remarked, as appears above, that the second question concerned the possible abuse of a dominant position within the meaning of Article 86 of the Treaty. It also remarked, in this context, that

> Where the performers on the recordings are under exclusive contract to the producer, there is reason to consider, among other things, their popularity with the public, the duration and scope of their commitments, as well as the possibilities other producers of sound recordings have to acquire artists for comparable performances."

Against this background the Court ruled that

> (1) The exercise by a producer of sound recordings of its exclusive right under the laws of a Member State to distribute the protected products, in order to prohibit the sale in that State of products distributed by the producer itself or with its approval in another Member State solely for the reason that such distribution does not take place on the territory of the first Member State, is contrary to the rules providing for the free movement of goods within the Common Market.
>
> (2) (a) A producer of sound recordings that is the holder under a national law of an exclusive distribution right does not occupy a dominant position within the meaning of Article 86 of the Treaty solely because it exercises this right. It would be otherwise if, under the circumstances of the case, the producer could prevent effective competition on an important part of the relevant market.
>
> (b) While the difference between the imposed price and the price of the product reimported from another Member State does

not necessarily prove an abuse of a dominant position, it can nevertheless, because of the size of the difference and in the absence of objective justification, constitute a decisive indication of such abuse.

The Court said that

Under Article 85, paragraph 1, of the Treaty, "all agreements between enterprises, all decisions of associations of enterprises, and all concerted practices that are likely to affect trade between Member States and whose object or effect is to prevent, restrict, or distort competition within the Common Market are prohibited." The exercise of the exclusive right referred to in the question could fall within the prohibition set forth in that provision wherever it appears to be the object, the means, or the result of an agreement which, by prohibiting imports from other Member States of products lawfully sold in those States, would have the effect of partitioning the market.

However, where such exercise would escape the elements of contract or concert contemplated in that provision, the answer to the question submitted would make it necessary to determine whether the exercise of the right to protection is compatible with other provisions of the Treaty, particularly those relating to the free movement of goods.

It will be noted that the Court of Justice arrived at the part of its judgment that relates to the illegality of preventing the free movement of goods by relating Article 3 which relates back to Article 2 (see page 2) to the Articles of the Treaty which relate to the free movement of goods. Among these Articles is, e.g., Article 9 which envisages the prohibition, as between Member States,

of customs duties and the like. The Court appears to be saying that it will consider as unlawful any practice which would impair the free movements of goods envisaged by Article 9 and other like Articles even though the practice employed is not referred to in such Articles; which would clearly amount to a ruling by analogy.

De minimis effect:
rule of reason; parallel imports

The Cadillon case [79]

Cadillon, (a French firm) sued Höss (a German firm) in a French court for breach of a contract whereby Höss granted Cadillon the exclusive right to sell its cement equipment products in France. Höss defended, *inter alia*, on the ground that the contract was null and void because exclusive distribution contracts were prohibited by Article 85 of the Treaty. The French court referred the point to the Court of Justice for a ruling as to the effect of Article 85.

Some question was raised before the Court of Justice as to whether it should entertain so general a reference, but it did so, again in a general way.

The Court of Justice said:

> In order for Article 85 of the Treaty to apply an agreement must first of all be likely to affect trade between the Member States. This condition is fulfilled if, on the basis of a combination of objective elements of law or of fact, it appears with a sufficient degree of probability that the agreement can have a direct or indirect, actual or potential influence on the flow of trade between Member States in such a way that it could impair the realization of the objectives of a single market between the

States.

In addition, the prohibition of Article 85, paragraph 1, can apply only if the object or the effect of the agreement is to prevent, restrict, or distort competition within the Common Market. These conditions must be viewed within the actual framework in which the agreement was entered into.

An exclusive distribution contract, even one that provides for absolute territorial protection, may be exempt from the prohibition of Article 85, paragraph 1, because in view of the parties' weak position on the relevant market in the protected territory, the realization of a single market between States is not jeopardized. This is particularly true where such an agreement does not prevent third parties from making parallel imports into the protected territory or the licensee from re-exporting the contract products.

The national court must, however, determine whether these conditions are in fact met in each case.

If the agreement were prohibited under Article 85, paragraph 1, it would also have to be determined what effect Commission Regulation No. 67/67, relating to the group exemption of exclusive distribution agreements, would have on unregistered agreements of that type...

Abuse of dominant position;
extra-territorial reach of
Community institutions;
affiliated companies;
<u>definition of market</u>

The Continental Can case[80]

Continental Can of New York (CC) manufactured metal containers and paper and plastic packaging materials and machinery for the manufacture and utilization of such containers. It had acquired 85.8 per cent of the authorized capital of the German firm, SLW. In the same year (1969) CC contemplated the formation, together with the Metal Box Company Ltd. (MB) of London, of a European holding company in which CC's licensees in the Netherlands (TNV) and France (Carnaud) would be invited to participate. The latter decided not to. CC and TNV then entered into an agreement whereby CC would set up a Delaware company, Europemballage, (EC) to which it would transfer its holdings in SLW; CC would induce EC to make TNV shareholders, other than MB and Carnaud, offers for their shares; and CC would supply EC with the necessary funds for purchasing the TNV stock by acquiring additional EC shares. EC was set up accordingly and TNV published the EC offer to buy TNV stock. The Commission drew attention to the fact that the operation might offend Article 86 of the Treaty, whereupon MB postponed its plans to join EC but EC purchased TNV shares and bonds thus raising its original interest in TNV to 91.07 per cent. The Commission initiated proceedings and found (a) that CC which held through its subsidiary, SLW, a dominant position in a substantial part of the Common Market on the market for light containers for canned meats, meat products, fish and shellfish, as well as on the market for metal lids for glass jars, had abused this dominant position through the purchase by its subsidiary of approximately 80 per cent of the stock and convertible bonds of TNV and that this purchase resulted in virtually eliminating competition for such packaging products in a substantial part of the Common Market; and (b) that CC must terminate such infringement of Article 86 of the Treaty and submit proposals to

the Commission before July 1, 1972 to this end. EC and CC appealed to the Court of Justice.

Dealing with CC's argument that it was beyond the reach of both the Commission and the Court, the Court said:

> Plaintiffs cannot deny that Europemballage, which was formed by Continental on February 20, 1970, is a subsidiary of Continental. The fact that the subsidiary has its own legal personality is not sufficient to rule out the possibility that its conduct can be imputed to the parent company. This applies particularly where the subsidiary does not determine its market conduct autonomously but in the main follows the instructions of the parent company.

The Court went on to say that CC had instigated and enabled the conduct of EC so that the acquisition by EC of the TNV shares must be imputed not only to EC but also and primarily to CC. "Such an acquisition," said the Court, "which affects market conditions within the Community, is the type to which Community law applies. The fact that Continental does not have its seat in the territory of one of the Member States is not sufficient to remove this enterprise from the application of Community law."

Appellants argued that "structural measures taken by enterprises, such as the strengthening of a dominant position through a merger, do not ... meet the test of an abuse of a dominant position within the meaning of Article 86 of the Treaty."

The Court defined the issue as whether the word "abuse" in Article 86 of the Treaty refers only to actions that can have a direct effect on the market or whether it also applies to changes in the structure of an enterprise that would result in a serious alteration of competition in a

substantial part of the Common Market. Article 3 (f) of the Treaty, which provides that the activities of the Community shall include the establishment of a system ensuring that competition within the system is not distorted, is relevant to the interpretation of Articles 85 and 86 of the Treaty as is also Article 2 which gives the Community the task of "promoting throughout the Community a harmonious development of economic activities". Articles 85 to 90 are in implementation of the principles enunciated in Articles 2 and 3. Articles 85 and 86 pursue the same objective at different levels. An alteration of competition that is prohibited as the product of collective behaviour under Article 85 cannot become permissable because "... the conduct is successfully carried out under the influence of a dominant enterprise and leads to a merger by the participating enterprises. In the absence of express provisions, it cannot be assumed that the Treaty, which in Article 85 prohibits decisions of ordinary associations of enterprises that impair competition without eliminating it, would, in Article 86, permit enterprises, through a merger into an organic unity, to attain a position of such dominance as to virtually remove any serious possibility of competition. ...The aim of the authors of the Treaty to maintain actual or potential competition in the market, even in cases where restrictions of competition are permitted, is given expression in Article 85, paragraph 3 (b), of the Treaty. If Article 86 does not contain the same express provision, this is because the system it creates for dominant positions, unlike Article 85, paragraph 3, does not permit exceptions from the prohibition. The condition of Article 86 is to be interpreted to mean that the use of a dominant position must have been abusive in order to be prohibited. This provision lists a number of abuses, which it prohibits. The list is given

only by way of examples ... abusive conduct could be present where an enterprise in a dominant position strengthens that position to the point where the degree of domination achieved substantially hampers competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market."

When Article 86 of the EEC Treaty is so construed, the strengthening of the position held by one enterprise can be an abuse and prohibited under Article 86 of the Treaty regardless of the methods or means used to attain it, provided it has the effects described above.

The Court then proceeded to point out factual and economic errors on the part of the Commission. Basically, it had failed to define accurately the various product markets which it had envisaged; and it had fragmented these markets unwarrantably, not paying sufficient attention to the interchangeability of some products and to the fact that certain producers, by making simple adjustments, could have entered markets which the Commission had delineated. The Court pointed also to instances where the Commission had failed to substantiate the statistics and its holding of little exchangeability of products; and it also pointed out various inconsistencies in the Commission's findings of fact. The Court therefore reversed the Commission's decision, and charged the Commission with the costs of the proceedings.

The Commission may be said, in the circumstances, to have lost a battle but to have won a war. Whether or not the Court took too refined an approach to market definition, it did establish that the deliberate extension or entrenchment of a dominant position may, in itself, be an abuse within the meaning of Article 86.

Effect on national court proceedings
of proceedings commenced by Commission

The Sabam case[81]

The Sabam case makes clear that national courts are free to continue civil actions involving the possible application of Article 85 or 86 notwithstanding any proceedings being conducted by the Commission. The facts are, briefly, that two persons who cooperated in the writing of songs had a long term contract with Sabam, a Belgium copyright protection organization. These persons composed, for one of Belgium's radio and television services, a song which immediately became a hit and controversy arose as to who had the copyright. While litigation was proceeding before the Belgian courts, the Commission commenced an inquiry involving Sabam and the Belgium Court then sought an opinion from the Court of Justice as to the relevance to the suit of Articles 86 and 90. The Commission intervened to argue that the Court of Justice had no jurisdiction by reason of the proceedings commenced by the Commission. While the Court in Sabam ruled against the Commission, it also noted that the policy of continuing a case relating to an issue on which the Commission is engaged is a different matter. Where a national court, before whom an issue as to Article 85 or 86 is raised, believes either that Article 85 or 86 clearly applies or clearly does not apply, such court should, according to the Sabam decision, continue the case.

Dominant position; relevant market;
abuse of dominant position; effect
of abuse on inter-Member State trade;
economic unit; nature of measures
prescribed to end abuse.

The Commercial Solvents case[82]

Commercial Solvents Corporation ("CSC"), a U.S. company, produced aminobutanol and manufactured therefrom and sold ethambutol, used as a drug. In 1962, CSC acquired control of an Italian company ("ICI") (51 per cent of the voting stock, parity on the Board of Directors and Executive Committee, and chairmanship of the Board of Directors with a deciding vote for CSC's President). Until 1970 ICI resold aminobutanol, produced in the U.S. by CSC, to another Italian company (Zoja) which used it to manufacture derivative specialties. In that year ICI began production of its own such specialties. In the same year CSC decided that it would no longer supply aminobutanol to the Common Market but would supply instead an intermediate chemical which ICI would convert to a further intermediate (ethambutanol) for sale in the Common Market and the manufacture of its own specialties. CSC then discontinued the supply of aminobutanol for sale in the Common Market. Failing to find a source of aminobutanol anywhere in the world market, except CSC, Zoja applied to the Commission alleging an infringement of Articles 85 and 86 of the Treaty and asking for the institution of proceedings against CSC and ICI to end such infringement. The Commission found an infringement of Article 86 and directed CSC and ICI, under pain of penalties, to supply Zoja with its immediate urgent requirement and to submit to the Commission proposals for subsequent supply to Zoja. CSC and ICI applied to the Court of Justice to annul the Commission's decision.

1. Application of Article 86

The Court examined five questions: whether there was a dominant position under Article 86; what was the relevant market; whether there was

abuse of a dominant position; whether any such abuse could affect trade among Member States; and whether CSC and ICI had acted as an economic unit.

(a) Dominant position. The Court rejected arguments and expert evidence to the effect that there were other source materials and processes available for the production of aminobutanol on the ground that such production was experimental and on a small scale. The Commission was entitled, refusing a request for an expert's report, to conclude "that in the present conditions of economic competition it is not possible to have recourse on an industrial scale to methods of manufacture of ethambutol based on the use of different raw materials" from those produced by CSC and ICS.

(b) Definition of relevant market. It was argued that ethambutol did not constitute a market, because ethambutol was only part of a larger market for antituberculosis drugs, where it was in competition with other, largely interchangeable drugs, and that, therefore, the raw materials for the manufacture of ethambutol could not constitute a market. The Court distinguished the market for the raw materials from the market for the finished product and said that an "abuse of a dominant position on the market for raw materials... may have effects restricting competition in the market on which the derivatives... are sold, and these effects must be taken into account in considering the effects of an infringement, even if the market for the derivative does not constitute a self-contained market".

(c) Abuse of dominant position. CSC explained that it had decided to expand into the production of derivatives and to limit or substantially discontinue the supply of the raw materials in

order to facilitate its own access to the derivatives market. The Court said that "an undertaking that is in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which, in the case in question, would have amounted to eliminating one of the principal manufacturers of ethambutol in the Common Market. ...Such conduct is contrary to the objectives expressed in Article 3 (f) of the Treaty and set out in greater detail in Articles 85 and 86... [and such undertaking] is abusing its dominant position within the meaning of Article 86."

(d) Effects on trade between Member States.

CSC and ICI argued that since Zoja exported 90 per cent of its production outside the Common Market, the world market rather than the Common Market was that affected. The Court referred to Article 3 (f) of the Treaty which provides that the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted, and Article 2 which gives the Commission the task of promoting, throughout the Community, harmonious development of economic activities; and the Court went on to say that "The Community authorities must therefore consider all the consequences that the conduct complained of has on the competitive structure in the Common Market without distinguishing between production intended for sale within the market and that intended for export. When an undertaking in a dominant position within the Common Market abusively exploits its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade

within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market." And in any event it had been shown that Zoja did export the products in question to the other Member States.

(e) <u>CSC AND ICI as one economic unit</u>. CSC and ICI disputed that they constituted an economic unit on the ground that they had always acted independently, in which case CSC could not be said to have acted within the Community, and the author of the conduct complained about could only be ICI which did not have there a dominant position. The Court sustained the Commission's findings that CSC had in fact exercised its control over ICI, at least in respect of the latter's relations with Zoja; and the Court enumerated examples: ICI had attempted a merger with Zoja which implied CSC's privity; CSC showed ICI as a subsidiary in its annual reports; CSC's decision no longer to sell aminobutanol on the market was obviously related to the supply thereof to ICI for the manufacture of its own derivatives, etc. The Court then went on to say that "As regards the market in nitropropane [a source material for aminobutanol] and its derivatives the conduct of CSC and Instituto [ICI] has thus been characterized by an obviously united action, which, taking account of the power of control that CSC had over Instituto, confirms the conclusions in the decision that as regards their relations with Zoja the two companies must be deemed an economic unit, and that they are jointly and severally responsible for the conduct complained of. In these circumstances the argument of CSC that it did not do business within the Community and that therefore the Commission lacked competence to apply Regulation No. 17/62 to it must likewise be rejected." (Regulation No. 17/62 is the regulation of the Council empowering the Commission to oblige enterprises to discontinue infringements of Articles 85 and 86).

II. Measures and sanctions imposed.

CSC and ICI argued that Regulation No. 17/62, Article 3 gave the Commission no authority to order specific supplies for Zoja. Article 3 provides that where the Commission finds an infringement "it may by decision require the ... [persons] ... concerned to bring such infringement to an end." The Court said that "This provision must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain actions, practices or situations that are contrary to the Treaty. For this purpose the Commission may, if necessary, require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty." This argument of CSC and ICI therefore failed.

CSC and ICI also argued that the Commission, in determining the supplies required by Zoja, had wrongfully considered its position in the world market instead of only in the Common Market. The Court said that when Article 86 of the Treaty prohibited an abuse of a dominant position "in so far as it may affect trade between Member States", this did not mean "that only the effects of a possible infringement on trade within the Community must be taken into account when it is a question of defining the infringement and its consequences. Moreover, the rather limited measure that the applicants suggested would have resulted in the production and sales outlets of Zoja being controlled by CSC-Instituto and in Zoja being in a position where its cost price would have been affected to such an extent that its production of ethambutol would have been in danger of being unmarketable. In these circumstances the Commission could well consider that maintaining an effective competitive

structure necessitated the measures in question." Therefore this argument by CSC and ICI also failed.

As to the penalty imposed upon CSC and ICI by the Commission, the Court considered that it should be mitigated because of the comparatively short duration of the infringement (approximately two years); the delay on the part of the Commission without which the duration might have been shorter; and the fact that CSC-ICI had provided the supplies ordered by the Commission. The Court therefore reduced the penalty from 100,000 units of account to half that amount (62,500,000 lire). The cost of the Court proceedings were ordered to be paid by CSC and ICI.

Relationship between Community law and national law; respective jurisdiction of Community and national courts; refusal to sell in French law

The Nicolas case[83]

Photo-Ciné, a Paris firm, had regularly been supplied with photographic and motion picture equipment by the French manufacturer, Etablissement Beaulieu (EB) with whom it did considerable business. EB by contract granted Maison Brandt Frères (MBF), another Paris firm, exclusive right to promote, distribute and sell its equipment in metropolitan Paris, Brandt declined orders from Photo-Ciné, advising that Société Devaux, to whom Photo-Ciné could address its order if it wished, had been given an exclusive dealership for the district in question. The order was then sent to Société Devaux who did not make delivery and Photo-Cité filed a complaint against Brandt under the French commercial law, asking damages from the President and General Manager of Brandt (Nicolas). The Court of Appeals of Amiens found

Nicolas guilty of refusal to sell, fined him 5000 francs, declared Brandt civilly liable, but rejected Photo-Ciné's claim for damages on the ground the damage claimed had been sustained by the public at large (the latter, apparently because Photo-Ciné had been selling at 15 per cent to 27 per cent below the accepted retail price). The Court of Paris affirmed this judgment on the ground that Brandt had not brought itself within any of the exemptions to the prohibition of refusal to sell in the French law. In the Court of Appeals of Amiens, Brandt alleged a conflict between the French law and that of the Community contained in Article 85 of the Treaty, relying upon an indirect reference in the statement filed by the (French) Director of Economic Investigations, and requested a reference for interpretation to the Court of Justice. Brandt's argument was to the effect that it had given notice to the Commission of its various agreements with dealers in Belgium, Luxembourg, Italy and Germany, under which exclusive contracts were given to retailers; that such notification gave provisional legality to such agreements, and it could be inferred from the acknowledgement it had received from the Commission that henceforth the Commission alone was competent to rule the agreements unlawful. The Amiens Court said that so long as the Commission had initiated no proceedings, the national Courts had jurisdiction to determine whether an agreement was caught by Article 85. On the facts the Court held that the refusal of Brandt, a French firm, to deliver to Photo-Ciné, also a French firm, Beaulieu cameras manufactured in France "is not one of those concerted practices likely to affect trade between Member States". Brandt had in no way passed on to French retailers obligations not to export to other Member States, thus distinguishing the arrangements in France from those in the other Member States whose dealers had been placed under such an obligation. In any event, a favourable decision from the Commission

"would only result in allowing such contracts to escape prohibition and nullification under the Rome Treaty. Since the absence of a prohibition in one law does not vitiate a prohibition imposed by another, the fact that the exclusive dealership contract in question was not prohibited by the Community law would not suffice to justify an act prohibited by French criminal law."

Brandt then argued the point another way, claiming that Article 85 does not unconditionally prohibit refusal to deliver as does the French law, and that the "conflict" made essential a reference to the Court of Justice pursuant to Article 177 of the Treaty. The Court replied that the Court of Justice had been given jurisdiction to apply community law but not to rule on conflicts between such law and national law. The Court said, in effect, that Brandt was trying to befog the issue by pretending that the issue was exclusive dealership, whereas it was actually an attempt to get around the ban on resale price maintenance by a refusal to deal.

The Court therefore concluded that there was no cause to apply to the Court of Justice for a ruling or to the (French) Technical Commission on Cartels for an opinion. The Court found Nicolas guilty of the offence of refusal to sell and Brandt civilly liable for Nicolas' actions. The fine, however, was reduced to 1000 francs. Nicolas and Brandt were charged with the main costs.

On further appeal to the Court of Cassation, the Court held that, in deciding that a decision of the Court of Justice was unnecessary, the Appellate Court was acting in accordance with Article 177 (references to the Court of Justice for rulings) of the Treaty of Rome: and Nicolas and Brandt were ordered to pay the fine, "this by bodily detention [for the legal minimum] in the case of ... Nicolas."

It is not clear just how this decision sits with Article 177 (as to which see pages 25-26) but, as it stands, the decision would appear to warrant the following propositions:

> At least where the Commission has not initiated proceedings on the same facts (and, inferentially while no such proceedings are before the Court of Justice) a national Court has jurisdiction, in an action between parties not directly relating to the Treaty, to determine whether an agreement in issue is contrary to Article 85.
>
> The absence, in the Community law, particularly Article 85, of a prohibition against a given activity of a general nature dealt with therein does not prevent such activity from being proscribed by national law.
>
> The Court of Justice has jurisdiction to apply Community law but not to rule on conflicts between such law and national law.

Nevertheless it would appear that the second last proposition was too broadly, or not well, stated by the Court of Appeal of Amiens, and that it was stated unnecessarily broadly for the purposes of the case. All that needed to be decided was the constitutional issue that has frequently arisen in Canada: where federal legislation goes a certain distance for one purpose, may provincial legislation dealing with the same or a similar fact situation go further for another, provincial purpose, e.g., if federal legislation makes criminally negligent driving an offence, can provincial law relating to highway safety and control make merely careless driving an offence.

The answer, of course, is in the affirmative, based upon the principle that, to be displaced, the provincial would have to meet the federal law in actual conflict, i.e., it would have to be said that if the provincial law applied, the federal law would be rendered inoperative. The problem is rendered more difficult, in the present case, because it is perhaps more difficult to distinguish between the purpose of the Community law and the national law than it is, in the example given, to distinguish between the purpose of the federal law and that of the provincial law. On the other hand, rationalization can probably be made that the Community law relates to inter-Member State trade and the national law only relates to the national market. Of course, if the Community law were of both negative and positive intent: if, e.g. the tenor of the Community law were that restraint on competition was, up to a point, desirable in the interest of achieving some higher economy of scale, a national law that forbade cooperation instead of competition, under that point, would semble have to yield.

Effect of exclusive distributorship in combination with national law

The Dassonville case[84]

Articles 9 to 37 of the Rome Treaty aim at the free flow of goods between Member States. Article 9 provides that the Community shall be based on a customs union which shall cover all trade in goods and involve the prohibition between Member States of customs duties on imports and exports and all charges having equivalent effect. Article 30 provides that quantitative restrictions on imports and all measures having equivalent effects shall, subject to certain exclusions, be prohibited between Member States. Article 36 sets out one of these exclusions: prohibitions and restrictions for the protection of commercial and industrial property as long as they do not

constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. (Section 121 of the British North America Act provides that "All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, ... be admitted free into each of the other Provinces.")

Exclusive distributorships for two brands of Scotch whisky had been conferred upon two Belgian firms, Fourcroy and Benoit, but Dassonville obtained supplies that had been legally imported into France, for distribution there, and brought them to the Belgian market. Belgian law required that goods bearing any designation of origin adopted by the Belgium government must carry certificates from the State of origin verifying that the goods to which a Belgian designation applied were in fact within such designation; and the Belgian government had adopted "Scotch Whisky" as one such designation. The authenticity of the Scotch whisky in question was not in dispute, but it was, in the circumstances, a practical trade impossibility for Dassonville to obtain a British certification and he had not obtained any such. The Public Prosecutor prosecuted Dassonville for breach of the Belgian measure and Fourcroy and Benoit brought civil action against him, as they were entitled to do under the Belgian commercial law, relying on Articles 30 to 33 and 36 and upon Article 85 of the Treaty. (Articles 31, 32 and 33 are in support of Article 30 and need not be further described.) Upon a reference for guidance from the Belgian Court, the Court of Justice ruled, in respect of the Articles relating to the free flow of goods, and in respect of Article 85, respectively, as follows:

> 1. The requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an

> authentic product that has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.
>
> 2. The fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so does not suffice, in itself, to render the agreement null and void.

The decision of the Court under Article 85 appears to take a more restrictive tone than is consonant with previous decisions and it was at variance with the opinion and recommendation of the Advocate-General who in his opinion said:

> Considered in this light, in the complex economic and legal context in which it actually operated, the exclusive dealing agreement to which the Belgian court refers may therefore prove to be prohibited by Article 85 (1). But such a decision can be made only on the basis of an examination of the facts. Consequently, within the context of the present proceedings, this is a matter for the Belgian court.

The variance lies in emphasis, however, as witness the language of the Judge-Advocate: "may therefore prove to be prohibited", and of the Court: "does not suffice, in itself".

Price fixing

The Aluminum case [85]

A press release from the Commission dated

July 31, 1975[86] announced that the Commission had ruled that an agreement known as the "'IFTRA' Rules for Producers of Virgin Aluminum" constituted an infringement of Article 85 of the Treaty. The agreement was among German, Dutch and British producers who, with their subsidiaries, accounted for about 80 per cent of the production capacity of primary aluminum of the EEC; and it had also been adopted by major producers in Austria, Norway, Spain, Sweden, and Switzerland. From the general description in the press release it would appear that this was a case of a price-fixing combine thinly disguised as relating to "fair trade practices". Among other matters the Agreement provided for the private regulation of dumping, exchange of price information and penalties for normal competition practices such as price cutting. The Agreement had been entered into in 1972 when economic conditions in the industry had led certain of the firms to engage in "unfair competitive practices". Subsequently the aluminum market had become so strong that it was unnecessary to enforce the Agreement, but it was retained as a measure of insurance against the recurrence of a recession, until abandoned at the instance of the Commission in February 1975. The Commission came to its decision "because of the seriousness of the restrictions of competition, the importance of the economic sector involved, and the fact that the agreement could not have failed seriously to aggravate the rigidity already present in the aluminum market." The details supplied in the press release do not permit a closer examination of the manner in which the Agreement affected trade between Member States and distorted competition within the Community, but that it must have met these conditions is, perhaps, obvious. No mention is made of penalties so it would appear the course of the proceedings followed the pattern of a "program of compliance". The Commission remarked that it

had taken similar action in respect of a like agreement in the glass container industry on May 25, 1974. There is no indication that the case will be appealed.

Abuse of dominant position

The General Motors case[87]

Under Belgian law, General Motors Continental N.V., of Antwerp (GMC) was alone competent to examine whether new Opel automobiles, as well as those registered for less than six months in a foreign country, conformed to the standards required for operation in Belgium. In the relevant period in 1975, GMC charged an abusively high price for this service in respect of Opels that had not been sold through GMC's distribution network in Belgium, but were "parallel imports" (See page 43). In some cases users of the imported Opels suffered a detriment, and the general purpose of the discrimination was to prevent dealers and users from importing Opels using channels of distribution other than those provided by GMC. (It would appear that the "abusively high fee" of 5000 Belgian francs charged by GMC was excessive to the degree of 100 per cent to 400 per cent over its charge in respect of other, comparable, inspections, although the number of transactions in question was small, amounting to five established cases.) The Commission found that the abuse by GMC had in fact affected trade between Member States and was likely, had it not been discontinued, to affect such trade in the future; it was likely to deter users and independent dealers in other countries from purchasing Opels, or noticeably impede such sales. GMC knew that its fee in respect of the imported Opels was excessive and discriminatory and, at the very least, it knowingly accepted the possibility that its behaviour would impede the parallel import of new Opels and it was not unwilling that users and dealers would be caused thereby to refrain from making such imports. The question of dominant position was not to be decided by measurin

inspection fees against total sales but by the fact that GMC was the only source of the inspections. The parameters of the fine that could be imposed upon GMC for the abuse of its dominant position, contrary to Article 86, were 1,000 and 1,000,000 units of account. Regulation 17 required the Commission, in fixing the fine, to have regard both to the gravity and duration of the infringement. The Commission had regularly made clear how seriously it regarded any interference with parallel imports; on the other hand GMC had readily discontinued the infringement, made reimbursements and established a cost justified and non-discriminatory scale of fees. The Commission declared that GMC had intentionally infringed Article 86 by abuse of its dominant position and imposed a fine of 100,000 units of account (5,000,000 Belgian francs).

European Community Information for December, 1975 (Number Forty-seven), published by the Financial Times Limited of London, refers to the appeal taken by General Motors Continental to the Court of Justice in this case and comments that GMC "looks to be well on the way to winning its appeal" - a prediction based on the recommendation to the Court of the Advocate-General.

Abuse of dominant position; considerations relating to quantum of fine

The United Brands case[88]

United Brands Company of New York (U.B.C.) is a multinational conglomerate formed in 1970 by the merger of United Fruit Company of New-York with the largest meat producer in the U.S., John Morell. Its total annual business turnover amounts to about two billion dollars, 20 per cent of this relating to bananas, in which sector it is the world leader. The Commission began an enquiry as a result of complaints, received in 1974, from firms engaged in the

fruit business in Denmark and in Ireland. In the course of such enquiry the Commission concerned itself with the question as to whether certain practices of U.B.C. and its European subsidiaries were not contrary to the competition rules of the EEC, and in particular whether U.B.C., in the sale of Chiquita bananas, was not exploiting in an abusive manner, a dominant position on a substantial part of the Common Market contrary to Article 86 of the Rome Treaty. The enquiry disclosed that U.B.C. was the owner of numerous banana plantations, particularly in Central and South America; that it owned an important fleet of refrigerated vessels for the transport of bananas; that it controlled the ripening of the bananas in the consumer countries; and that it there organized all publicity and sales promotions (Slogan: "Don't ask for a banana, ask for a Chiquita") The enquiry disclosed that this marketing policy, in conjunction with the important part of the market held by U.B.C. in West Germany, Denmark, Ireland and the Benelux countries, conferred upon U.B.C. a dominant position in those markets. Although this position might be equally important on the English, French and Italian markets, the Commission did not take this into consideration in arriving at its present decision because of the different trading conditions and importation systems practised on these other markets.

The Commission was of the opinion, on the following grounds, that U.B.C. had exploited the dominant position abusively: it had prohibited its distributor-ripeners to resell bananas in a green state, which amounted to an absolute prohibition against reselling bananas, since for preservation reasons only green bananas could be sold for delivery to places at a medium or far distance, and hence a partitioning of the market; U.B.C. had practised price discrimination among its customers according to the Member States in which they were located, which inequalities in prices could not be justified by objective reasons; U.B.C. had, moreover, practised

price discrimination against its clients in Germany, in Denmark and in the Benelux countries, it appearing that for equivalent transactions the price differences in the ports of Bremerhaven and Rotterdam had, in certain cases, amounted to or exceeded 100 per cent; and, finally, U.B.C. had, during a period of almost two years, refused to supply Chiquita bananas to one of its principal Danish customers.

In the result the Commission decided to require U.B.C. to lower its prices in Germany, Denmark and the Benelux countries to a level at least 15 per cent below the level of the prices presently charged in Germany. To ensure implementation of this decision U.B.C. was required to keep the Commission informed, over a period of two years, as to the prices it had in effect in these last-mentioned markets. Because of the gravity of these contraventions of the competition rules of the EEC, the Commission imposed upon U.B.C. a fine of 1,000,000 units of account.[89]

APPENDIX B. FOOTNOTES

63. "Geitling" RuhrKohlen - VerKaufs - Ct. m.b.H. v. The High Authority, Case No. 13/60, July 17, 1962. C.M.L.R. 113, Recueil 165.

64. De Geus v. Bosch, Case No. 13/61, April 6, 1962. Recueil Vol. VIII, page 89; CCH Common Market Reporter, Vol. 2 (1966), Court Decisions, page 7133, paragraph 8003.

65. Société Technique Minière v. Maschinenbau Ulm GmbH, Case No. 56/65, June 30, 1966. CCH Common Market Reporter, Vol. 2 (1966), Court Decisions, page 7685, paragraph 8047.

66. Société Anonyme Cimenteries C.B.R. Cementsbedrijven N.V. et al. v. Commission of the European Economic Community, Cases Nos. 8-11/66, March 15, 1967. Recueil Vol. XIII-1, page 93; CCH Common Market Reporter, Court Decisions 1967-1970, page 7775, paragraph 8052.

67. Etablissements Consten and Grundig-Veraufs-GmbH, v. Commission of the European Economic Community, Cases Nos. 56/64 and 58/64, July 13, 1966. CCH Common Market Reporter, Vol. 2 (1966), Court Decisions, page 7618, paragraph 8046.

68. S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen, Case No. 23/67, December 12, 1967. Recueil Vol. XIII-5, page 525; CCH Common Market Reporter, Court Decisions 1967-1970, page 7799, paragraph 8053.

69. Parke, Davis, op. cit., note 46.

70. Marine Paints, op. cit., note 23.

71. Ibid

72. The <u>Marine Paints</u> case was discussed in an article by Professor Warren G. Schwartz of the University of Virginia School of Law and Edward W. Wellman, Jr., a student in Law, in the <u>Virginia Journal of International Law</u>, Volume 12, March 1972, Number 2: "The Rule of Reason in EEC Antitrust: Efficiency Enhancement Through Integration by Agreement Among Competitors". The foregoing hypothetical analyses draws upon such Article.

73. <u>Walt Wilhelm et al. v. Bundeskartellamt Berlin</u>, Case No. 14/68, February 13, 1969. Recueil Vol. XV, 1969-1, page 1; <u>CCH Common Market Reporter</u>, Court Decisions 1967-1970, page 7856, paragraph 8056.

74. <u>Völk</u>, <u>op. cit.</u>, note 25.

75. <u>Brauerei A. Bilger Söhne GmbH v. Heinrich and Marta Jehle</u>, Case No. 43/69, March 18, 1970. Recueil Vol. XVI, 1970-2, page 127; <u>CCH Common Market Reporter</u>, Court Decisions, 1967-1970, page 8103, paragraph 8076.

76. <u>Imperial Chemical Industries Ltd., London and Manchester v. Commission of the European Communities</u>, Case No. 48/69, July 4, 1972. Recueil Vol. XVIII, 1972-5, page 619; <u>CCH Common Market Reporter</u>, Court Decisions 1971-1973, page 8001, paragraph 8161.

77. <u>Sirena</u>, <u>op. cit.</u>, note 43.

78. <u>Deutsche Grammophon</u>, <u>op. cit.</u>, note 44.

79. <u>Société Anonyme Cadillon v. Firma Höss, Maschinenbau KG, CCH Common Market Reporter</u>, Court Decisions 1971-1973, page 7539, paragraph 8135.

80. <u>Continental Can</u>, <u>op. cit.</u>, note 14.

81. Radio en Televisie v. S.V. Sabam and N.V. Fonior, Case No. 127/73, January 30, 1974. CCH Common Market Reporter, Court Decisions 1974, page 9185-15, paragraph 8268.

82. Instituto Chemioterapico Italiano S. p.A. and Commercial Solvents Corporation v. Commission of the European Communities, Cases Nos. 7 and 7/73, March 6, 1974. Reports of Cases before the Court, Vol. 1974-3, page 223; CCH Common Market Reporter, Court Decisions 1974, page 8800, paragraph 8209.

83. Photo-Radio-Club v. Nicolas and Société Brandt, May 9, 1963, (Court of Amiens), CCH Common Market Reporter, Vol. 2 (1966), page 7245, paragraph 8011; Paul Nicolas and Société Brandt v. Photo-Radio-Club, October 22, 1964, (Court of Cassation, Paris), CCH Common Market Reporter, Vol. 2 (1966), page 7421, paragraph 8026.

84. Public Prosecutor v. Benoit and Gustave Dassonville, Case No. 8/74, July 11, 1974. Reports of Cases before the Court, Vol. 1974-5, page 837; CCH Common Market Reporter, Vol. 2, Court Decisions, page 7118, paragraph 8276.

85. Press Release from the Commission of the European Communities, No. IP (75) 148. Brussels, July 31, 1975; CCH Common Market Reporter, Vol. 2, page 9694, paragraph 9769.

86. Ibid.

87. Press Release from the Commission of the European Communities, No. IP (75) 2. Brussels, December 6, 1974. Commission Decision of December 19, 1974. Official Journal of the European Communities, No. L29, February 3, 1975, page 14.

88. *Press Release* of the Commission of the European Communities, Brussels, December 18, 1975: "Decision of the Commission in respect of United Brands Company of New York".

89. *Op. cit.*, note 11.

APPENDIX C

Rules Derived From The Jurisprudence

Articles 85 and 86 of the Treaty of Rome lay down the basic principles of the rules of competition that apply in the EEC. The legislative statement of these principles has, as is usual in such circumstances, left important questions of detail, and sometimes more than mere detail, to be settled by the jurisprudence of the Court of Justice. The decisions of the Court, and the decisions of the Commission and of national courts until challenged in the Court, therefor form an integral part of the competition law of the Community. Some of the more important of such decisions may be summarized as follows. (The numbers in brackets are the footnote references to the cases.)

Agreements, General

1. Article 85 applies not only to horizontal but also to vertical agreements (67).

2. The competition protected by Article 85 is not only competition between the parties to the agreement but also competition between such parties and third parties who may be affected by the agreement (67).

3. It is not necessary to consider the actual effects of an agreement which is impugned under Article 85; it is sufficient, given the other ingredients, that the purpose be to restrict or distort competition (67).

4. To evaluate the impact or intended impact of an impugned agreement it must be looked at in its actual factual (economic) and legal setting; e.g.,

if the law of a Member State affords the right of injunction to a party to an agreement against a third party whose behaviour would thwart the purpose of the agreement, such right is a fact to be taken into consideration in judging the effect or intended effect of the agreement (67).

5. In evaluating the impact or intended impact of an agreement, it should be considered in the context of the overall policy of either party, thus making relevant other like agreements existing between a party to the agreement and third parties (a corollary of Point 4) (67).

6. It is irrelevant that a market impact sought to be achieved by an agreement might have been achieved, in a different manner, by a legitimate reorganization of the structure of one of the parties, e.g., the forward integration of a producer into distribution (67).

7. The object of the agreement must be gathered from a consideration both of the agreement as a whole and its individual clauses; if such examination does not disclose an object of preventing, restricting or distorting competition, the next stop is to examine whether the effects of the agreement are such "that it prevents or perceptibly restricts or distorts competition" (65).

8. The prohibition against "concerted practices" in Article 85 (first paragraph) covers a form of coordination between firms that has not yet reached the point of

actual agreement but which, in practice, consciously substitutes a practical cooperation for the risks of competition (76).

9. Joint possession, on the part of parties to an agreement, of 80 per cent of the relevant market, is sufficient, the other ingredients being present, to bring the agreement within Article 85 (76).

10. The condition of affecting trade between Member States within the meaning of Article 85 is met if, "on the basis of a combination of objective elements of law and fact, it appears with a sufficient degree of probability that the agreement can have a direct or indirect, actual or potential influence on the flow of trade between Member States in such a way that it could impair the realization of the objectives of a single market between the States" (79).

Agreement, Exclusive Selling

11. An exclusive selling agreement may come, but is not *per se*, within the prohibitions of Article 85 (65).

12. Such an agreement must, among other things, in order to offend Article 85, give rise to a reasonable expectation that it might directly or indirectly, actually or potentially, influence the flow of trade between Member States and so be likely to hamper the realization of a single market (65).

13. In considering an exclusive selling

agreement, factors to be considered include (i) strictness of exclusivity provisions, (ii) the nature and quantity of products affected, (iii) the strength of the parties in the relevant market and (iv) the number of parties involved in the agreement and, possibly, in related agreements (65).

14. Agreements whereby a single national firm makes it a term of its sales for consumption within the national market that the products so sold will not be exported, the intention being to protect an exclusive selling agreement in another Member State, may, the other ingredients present, come within the prohibition of Article 85 as affecting trade between Member States (64).

15. An exclusive selling or buying agreement should not be regarded in isolation, but, rather, in the context of the prevalence of such agreements in the relevant market and of the structure of such market including such a consideration as that a relatively small number of sellers are imposing such type of agreement upon a very large percentage of all customers for the product in question (68), (75), (79).

<u>Industrial or Intellectual Property</u>

16. Although the grant of a patent, or other industrial or intellectual property right, is obviously, by definition, not the product of an agreement, so as to bring it within Article 85, or an abuse, so as to bring it within Article 86, nevertheless the moment the right becomes

subject to an agreement, or is exercised, the agreement and the exercise of the right are subject to examination under Articles 85 and 86 respectively and the fact that the right originated in a State conferred and permissable monopoly becomes irrelevant; presumably only an outright transfer of the right would avoid scrutiny under Article 85 and even such transfer might be scrutinized under Article 86 if the terms as to remuneration were such as to result in what was adjudged an excessive or exorbitant selling price of the article affected (46).

17. The exercise of an industrial or intellectual property right (in this case a trade mark), to prevent third parties from distributing the article affected in a Member State, is not _per se_ an abuse of a dominant position under Article 86; it is also necessary to prevent the maintenance of competition in a substantial part of the relevant market, and upon this issue the position of manufacturers or distributors of similar or substitute goods must also be considered (43).

18. The exercise, by the owner, of an industrial property right (in this case copyright), to prohibit the re-entry of the article to which the right applies into the national market in which it was sold may, depending upon the circumstances, constitute a contravention of Article 85 (if the result was brought about by agreement) or a contravention of Article 86 (if the result

was brought about by a dominant position) and it may also be illegal as contravening the rules of the Community providing for the free movement of goods within the Common Market (44).

19. The selling price of an article that is the subject-matter of an industrial or intellectual right is relevant evidence on the issue of whether there has been abuse of the dominant position created by the grant of the property right; and also relevant to that issue is the price under which is being sold the same article produced by another person under the corresponding right in another State or in a State which does not recognize any such right (46).

20. A difference between the price of an article sold under the program of the owner of an industrial right (in this case copyright) in the Member State of origin and the price of the same article which re-enters from another Member State to which it was exported (the latter being the lower), does not necessarily prove an abuse of a dominant position under Article 86, but it nevertheless may, because of the size of the difference and in the absence of objective qualification, be a decisive indication of such abuse (44).

21. A distinction must be drawn between a right in respect of a trade mark (or, semble, other industrial or intellectual property) and an agreement under which such right is used to restrict or distort competition (67).

22. Even where a trade mark, identical in

terms, is owned independently by different persons in different Member States, the owner of the trade mark in one Member State may be prevented, by reason of Article 85, from preventing the owner in another Member State from shipping the product which is the subject of the trade mark into the Member State of the first mentioned owner (41).

Abuse of Dominant Position

23. Having regard to Article 86, an enterprise which is in a dominant position as the producer of a raw material cannot, just because it decides to start manufacturing derivatives, in competition with its customers for the raw material, discontinue the supply of the raw material to such customers, where the effect is to eliminate their competition, particularly where such a customer or customers is or are the principal manufacturer or manufacturers of the derivative in the Common Market (82).

Procedural

24. Article 3 of Regulation No. 17, which, in general terms provides that, upon finding an infringement of Article 85 or 86, the Commission "can by means of a decision oblige the enterprises or association of enterprises concerned to put an end to such infringement" is to be interpreted as authorizing the Commission to give such specific direction as it deems necessary to end the infringement (82).

25. The function of the Court of Justice upon a reference under Article 177 of the Treaty is to interpret the terms of the Treaty and it is the role of the national Court to apply such interpretation so as to arrive at a decision in the case (65).

26. The Court, however, will not stand upon ceremony as to the form of the question referred to it; it will, if necessary, sift the material that comes up from the national Court so as to determine the true point upon which interpretation is required (65).

27. Any question of severability of offending clauses (so as to leave the remainder of the agreement enforceable) is for the national Court (65).

27.1 Until otherwise provided by Regulations made pursuant to the Treaty a Member State may proceed against a cartel under its own law, even where the cartel is being inquired into by the Commission, provided the application of the national law does not prejudice the full and uniform application of Community law (73), (83).

28. As a corollary of the last proposition it would appear that any cartel or other agreement which the Commission has positively approved, e.g., a specialization agreement, would not be amenable to national law; but *quaere* as to an agreement which the Commission or the Court of Justice has merely exempted under Article 85 (third paragraph) as having positive, over-riding

benefits, having in mind the positive function of the Community institutions to bring about improvements in production or distribution (73).

29. A company is not beyond the jurisdiction of the Court of Justice only because it is domiciled outside the Community; jurisdiction may be founded upon acts caused to be done within the Community (although in order to apply sanctions it would appear, as a practical matter, to be necessary to find some "presence" of the company within the Community) (14), (76).

30. The character of the Commission is administrative rather than judicial (67).

31. As an administrative body the Commission must observe the obvious rules of justice applicable to a body of this character: the parties, in order to exercise their right to be heard, must be apprized of the facts and the issues; but this does not mean that every individual piece of evidence taken into consideration must be communicated to them as in a court of law; reasons need not be given for rejecting pleas of the parties (but see the case following); it is encumbent upon a party claiming an exemption to prove the facts within its knowledge alleged to justify the exemption and not for the Commission to dig them out; but at the same time, if the parties raise a defence and the Commission is in a position to overcome a difficulty the parties are experiencing in supporting

such defence, the Commission should afford them such reasonable assistance as is within its superior means (67).

32. The Commission must set out its reasons for every substantive decision with sufficient clarity to inform the parties and, in the event of an appeal, to permit the court to make a meaningful review (66).

33. The fact that the Commission has commenced an inquiry does not deprive a national court of jurisdiction in a private suit in which the same Articles of the Treaty are in issue on the same facts, nor deprive the Court of Justice of jurisdiction to entertain an application from the national court for an opinion upon the interpretation of such Articles in their relation to such facts; but the policy of the national court continuing such proceedings is a different matter (81).

Criteria for Exemption

34. The improvement of production or distribution contemplated by Article 85 as a ground of exemption is not subjective as relating to the parties to the agreement but objective as affording advantages to the public capable of compensating for the detriment caused to competition (67).

35. Factors which may entitle an agreement, though it involves price fixing and some interference with competition, to the exemption in Article 85 (third paragraph) include (1) that the participants do not, among them, account for a substan-

tial part of the overall market in which they operate; (2) that the agreement confers an advantage of convenience upon customers by permitting them more readily to obtain a product suited to their needs; (3) that the fact of the agreement stimulates competition between group members and firms outside the group (in effect makes the group and its members a stronger force for competition than they would be if acting independently); and (4) that the restrictions imposed upon competition among members of the group are no greater than is required in order to maintain the arrangement (23).

Role of Court of Justice

36. Upon a request by a national court to the Court of Justice for a ruling on a point of interpretation of the Treaty, arising in a private suit, the role of the Court of Justice is not to decide the issue as between the parties, but only to indicate how the provision in question of the Treaty should be interpreted. Nevertheless the Court of Justice will not stand upon the form of a question put by a national court but will extract from the questions and material placed before it the precise questions that concern the interpretation of the Treaty (25).

De Minimis Rule

37. Agreements which affect competition in trade between Member States may nevertheless, because of the weak position of the parties or for some other

reason similar in effect, not measure up to the degree of affectation necessary to bring an agreement within the prohibition of Article 85 (1), (25), (79).

Affiliates

38. Whether or not a parent company and its subsidiary are to be regarded as separate enterprises on the one hand or as forming one "economic unity" on the other hand, is a question of fact depending upon whether the subsidiary does or does not have autonomy in determining its course of conduct on the market (76).

39. The relationship between a parent and subsidiary company may place them in this dilemma: the other ingredients of Articles 85 and 86 being present, the companies are either subject to Article 85 for agreeing to distort competition or to Article 86 for abuse of a dominant position (76).

40. A parent company and its subsidiary are (*semble*) not to be regarded as a single economic unity on the basis of that relationship alone, but the Court will look for indicia that the parent actually asserted its authority over the subsidiary. (The expression "subsidiary" is here used in its dictionary meaning of voting control. *Quaere* as to how the Court of Justice would regard a situation where one company held less than 51 per cent of the voting shares of another company but, by reason of dispersal of shareholdings, had "working" control of the other company.) (82), (76).

Mergers

41. An abuse within the meaning of Article 86 occurs when an enterprise that is in a dominant position strengthens that position, by acquisition, to the point where the degree of domination achieved substantially hampers competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise remain in the market (14).

BIBLIOGRAPHY

Publications consulted and, where indicated throughout the text, drawn upon.

CCH Common Market Reporter, Vol's. 1 and 2 and Transfer Binders of court decisions.

The EEC Rules of Competition: Willy Alexander. (Kluwer Harrap Handbook London 1973)

The Law of the European Economic Community: K. Lipstein. (London Butterworths 1974)

The Law of the Common Market: B.A. Worthy, Ed. (Manchester University Press; U.S.A.: Oceana Publications Inc.)

European Commercial Law: Berthold Goldman. (Steven & Sons London; Matthew Bender New York; 1973)

Common Market Law Review, various volumes. (Stevens London; A.W. Sijthoff Leyden; F.B. Rothman & Co. New Jersey; F. Lancier S.A. Brussels)

European Company Law Texts: Professor Clive Schmitthoff, Ed. (Matthew Bender New York; Stevens & Sons London; 1974)

Restrictive Practices and Monopolies in E.E.C. Law: James P. Cunningham. (Kogan Page Limited London 1973)

Columbia Journal of Transnational Law: Vol. 12, 1973. (William S. Hein and Co., Inc. New York)

CCH Common Market Cartel Law: Conrad W. Oberdorfer and Alfred Gleiss (1963)

Annual Reports on Competition Policy of the Commission of the European Communities. (Brussels & Luxembourg)

Proposed Statute for the European Company: Commission of the European Communities Secretariat. (Brussels 1970)

Recueil du droit de la concurrence dans la Communauté économique européenne et dans la Communauté européenne du charbon et de l'acier. (EEC Commission Brussels 1972)

Concentration or Competition: A European Dilemma: D. Swann and D.L. McLachlan. (Chatham House; PEP; 1967)

La répression de la concurrence déloyale dans les States membres de la C.E.C., Vol. 1: H.C. Eugen Ulmer and Friedrich - Karl Beier. (Dr. Dr. H.C. Eugen Ulmer Munich)

The Antitrust Bulletin, various volumes. (Record Press, Inc. New York)

Rules of Competition in the European Economic Community: Electronic Engineering Association. (London) (1972)

Etudes, No.'s 1, 2 and 11 (Collection Etudes de la Commission des Communautés Européennes 1966, 1966, 1971)

Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council of the United Nations. (United Nations New York 1953)

Treaty establishing the European Coal and Steel Community: High Authority of the European Coal and Steel Community. (Fanfare Press London 1951 or post)

The Competition Law of the E.E.C.: James P. Cunningham. (Noyes Data Corporation New Jersey and London 1973)

European Competition Policy: The Europa Institute of the University of Leiden, Ed. (A.W. Sijthoff Leiden 1973)

Directory of the Commission of the European Communities: Commission of the European Communities. (September 1975)

The Economic Journal: No. 289 March 1963 Vol. LXXIII: The Royal Economic Society. (Mac Millan and Co. Limited London; St. Martin's Press New York)

International Aspects of Antitrust Laws: Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate. (U.S. Government Printing Office Washington 1974)

Community Law through the Cases: Neil Elles and J.H. Vallatt. (Stevens & Sons London; Matthew Bender New York; 1973)

Guide to Legislation on Restrictive Business Practices: O.E.C.D. (Organization for Economic Co-operation and Development Paris)

Virginia Journal of International Law, Volume 12, March 1972 Number 2. (University Press of Virginia Charlottesville)

Official Journals of the European Communities. (Commission of the European Communities)

AUSTRALIA

COMPETITION POLICY AND PRACTICES

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Various sections of the Australian Trade Practices Act which relate to Stage Two amendments to the Canadian Combines Investigation Act are examined in this paper. Specifically, those relating to mergers, monopolization, price discrimination, specialization agreements, export agreements, and delivered pricing are discussed. Another Stage Two amendment, regarding interlocking directorates, is nowhere mentioned nor alluded to in the Australian legislation, so is not examined here.

The format of the paper is as follows: First, a background to the Australian antitrust experience is given. Then, the administration of the present Act is briefly summarized. Next, each of the above restrictive practices is discussed. In all but specialization agreements and delivered pricing, a comparison with prior Australian legislation is made. Commentaries from learned journals and from other sources are included wherever possible; however, this is minimal since the Australian law was revised only in 1974 and thus little journal examination and opinion is yet available.

I. BACKGROUND

In examining the Australian experience in restrictive practices legislation, it should be noted that until 1965, the questioning of restrictive practices by Government and others was largely non-existent. The deterring effect of an early Act, the Australian Industries Preservation Act 1906, with its clause making it "illegal to enter into a combination in relation to trade and commerce among the states of the Commonwealth with intent to restrain trade or commerce to the detriment of the public or with intent to destroy or injure by means of unfair competition any Australian industry" was completely emasculated by early decisions in Australian courts, with the result that no cases were brought under that Act from 1913 to 1964.[1] State acts were also largely ineffectual, suffering from "poor drafting, restrictive interpretation, and half-hearted enforcement."[2]

The legal environment, then, was conducive to the situation which developed: a couple of hundred firms grew to dominate the private sector of the economy, "in each of the fields of manufacturing, mining, finance and retailing, the greater part of activity (took) place in monopolistic or oligopolistic markets."[3] Restrictive trade practices were rampant - it was said that "every restrictive practices known to man"[4] existed in Australia. Not only were restrictive practices common, but they were accepted as being legitimate forms of business activity. Quoting Karmel and Brunt, from their 1961 study:

> Restrictive practices have a long history in Australia and have come to be regarded by businessmen and consumers alike as normal business behaviour. Indeed, certainly until very recently the average businessman would have been rather hurt to hear his trade agreements described as restrictive.[5]

Two significant developments occurred in the late 1950's. In 1958, a Western Australia Royal Commission reported on the extent of restrictive trade practices in that State.[6] And in 1959 a committee which had been set up to review the constitution recommended the extension of Commonwealth powers in the field of restrictive practices.[7]

In 1962, the Government gave notice that it was in the process of developing new restrictive practices legislation in order to further competition in the economy:

> The Government . . . has concluded . . . that there are practices current in the community which by reason of their restrictive nature are harmful to the public interest - that interest being in the maintenance of free enterprise under which citizens are at liberty to participate in the production and distribution of the nation's wealth, thus ensuring competitive conditions which tend to initiative, resourcefulness, productive efficiency, high output and fair and reasonable prices to the consumer. . .
>
> The Government believes that practices which reduce competition may endanger those benefits which we properly expect and mostly enjoy from a free enterprise society . . .[8]

However, this was tempered by an opposite view that competition might not be desirable in all circumstances:

> . . . the lessening of competition may, in some aspects of the economy, be unavoidable, and, indeed, may be not only consistent with, but a proper ingredient of, a truly free enterprise system.[9]

The legislation which resulted, the Trade Practices Act 1965, based on the British Restrictive Trade Practices Act of 1956, was rather weak.[10] Restrictive activities, even when registered with the Commissioner of Trade Practices, were still allowed to take place until successfully challenged.[11] Only two (later three) practices were made *per se* illegal - collusive bidding and collusive tendering[12] (later, in 1971, resale price maintenance) - and, of these, one (collusive tendering) could be justified under certain circumstances. Merger provisions, proposed by the Government at an earlier stage, were dropped completely; the monopolization provisions were fraught with loopholes (see below). However, one of the major difficulties was that restrictive practices which would have been illegal under the legislation of other industrialized nations were not forbidden *per se* but were subject to a case-by-case examination under public-interest criteria as laid down in the Act. These criteria were vague[13] and allowed much scope for leeway by the Trade Practices Tribunal, the administering agency, in determining whether a restrictive practice was contrary to the public interest. The ultimate power of the Tribunal was a cease and desist order to the firms involved. Attempts to apply the Act resulted in a number of court cases, challenging the Act on constitutional grounds. In one of the cases, the Concrete Pipes case, the Act was held to be invalid, and was soon replaced by a mostly similar Restrictive Trade Practices Act 1971. Besides this, however, it became obvious that the Act was inadequate. While it was true "that anti-competitive agreements (were) no longer simply . . . taken for granted, as . . . in the past"[14] by Australian business, the Act was nonetheless of little aid in creating a business environment conducive to competitive forces; for restrictive practices were still being undertaken by business. Baxt and Brunt commented that the Act was "vague in its philosophy of competition, ambiguous in its test of public interest, ineffectual in its case-by-case and consultative procedures,

lacking in guidelines for business, and deficient in coverage and remedies."[15]

The Australian Attorney-General noted the following:

> . . . the existing . . . Act . . . has proved to be one of the most ineffectual pieces of legislation ever passed by this Parliament . . . . Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse - they interfere with the interplay of competitive forces which are the foundation of any market economy; they allow discriminatory action against small businesses, exploitation of consumers and feather-bedding of industries . . .[16]

In 1973, a new Bill was introduced, which became law (in amended form) in 1974. Key clauses of this new Act are modelled on the Sherman Act and the Clayton Act of the United States. The major difference between the Trade Practices Act 1974 and the Trade Practices Act 1965 (later the Restrictive Trade Practices Act 1971) was that the former, instead of allowing restrictive trade practices to remain lawful until challenged successfully under public-interest criteria, itself prohibits anti-competitive activities. That is, it is now clearly delineated, in most circumstances, whether an activity is to be allowed or prohibited. Exceptions to the general rule are allowed under certain circumstances. Moreover, the powers of the Act are

extended, such as to mergers (see next Chapter). Financial penalties and other civil remedies are also provided for, rather than mere cease and desist orders.

It is too early at this point to comment on the effectiveness of the Trade Practices Act 1974 in attaining and maintaining competition in the Australian economy. Future developments should be watched with interest.

I. BACKGROUND

Footnotes

1. Warren J. Pengilley, "The Prospective Restrictive Practices Act of Australia", Antitrust Bulletin, Volume 10, 1965, p. 159.

2. Dr. Geoffrey de Q. Walker, "Competition Policy and the Corporation", in K.E. Lindgren, H.H. Mason & BLJ Gordon, eds., The Corporation and Australian Society (Law Book Company Ltd., Sydney-Melbourne-Brisbane, 1974).

3. P.H. Karmel, and Maureen Brunt, The Structure of the Australian Economy. (F.W. Cheshire, Melbourne-Canberra-Sydney, 1962), p. 93.

4. Ibid., p. 95.

5. Ibid., p. 94.

6. Western Australia, Report of the Honorary Royal Commission on Restrictive Trade Practices and Legislation, Perth, 1958.

7. Commonwealth of Australia, Report from the Joint Committee on Constitutional Review, 1959.

8. Speech by Hon. G. Freeth, M.P., on Restrictive Trade Practices, from the Parliamentary Debates, December 6, 1962.

9. Ibid.

10. The legislation was much less biting than the original proposals, made in 1962. This was due to considerable business opposition.

11. Commonwealth of Australia, Commissioner of Trade Practices, Sixth Annual Report, 1973 p. 1.

12. Collusive bidding refers to bidding at an auction. Collusive tendering refers to submission of tenders, but not at an auction.

13. See Warren Pengilley, "Comments on Arguments in Justification of Agreements in Restraint of Trade - The United Kingdom, Australian and New Zealand Experience", Antitrust-Bulletin, Volume 19, 1974, p. 259, and Warren Pengilley, "Australian Experience of Antitrust Regulation - A Vindication of the Per Se Approach", Antitrust Bulletin, Volume 18, 1973, p. 371, for a discussion of this point.

14. Commonwealth of Australia, Commissioner of Trade Practices, Third Annual Report, 1970, p.10.

15. Robert Baxt and Maureen Brunt, "The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means", Australian Business Law Review, Vol. 2. No. 1, April 1974, p. 3.

16. Speech by the Senator Hon. L. K. Murphy Q.C., Attorney-General and Minister for Customs and Excise on Trade Practices Bill 1974. Second Reading, Parliamentary Debates, July 30, 1974.

II. ADMINISTRATION OF PRESENT ACT

The administering body of the 1974 Trade Practices Act is the Trade Practices Commission, consisting of a chairman and other members.[17] All are appointed by the Governor General,[18] who also determines how many of these other members there are to be.[19] The Commission is given directions by the Attorney-General,[20] except regarding authorizations[21] and clearances[22], which are considered by the Commission upon application or notice by the companies concerned.

These terms are defined as follows: an authorization when granted allows the corporation "to make a contract or arrangement or enter into an understanding, that would be or might be in restraint of commerce, or to continue to be a party to a contract, arrangement or understanding that is or may be in restraint of trade or commerce",[23] and in doing so be protected from enforcement action. That is, the Act is deemed applicable to the situation, but a dispensation is granted,[24] and conduct which would otherwise be prohibited by the Act is allowed.

Authorizations may be granted in respect of:

- contracts arrangements or understandings in restraint of trade or commerce (other than those, not being in connection with business conducted on a joint basis, fixing or controlling or providing for the fixing or controlling of prices for the supply of goods),

- exclusive dealing

- mergers.[25]

An authorization may also be granted when "there are special considerations relating to the acquisition that make it desirable in the interests of national economic policy that an authorization be granted".[26]

A person dissatisfied with the Commission's refusal to grant an authorization can have the decision reviewed by an independent Tribunal, The Trade Practices Tribunal.[27]

A clearance when granted means "that the Commission considers that any restraint of trade or commerce that results from the contract, arrangement or understanding or would result from the proposed contract, arrangement or understanding, does not have and is not likely to have, or would not have and would not be likely to have, a significant effect on competition... (and hence) the contract, arrangement or understanding shall be deemed not to be in restraint of trade for the purposes of"[28] the Act.

The penalties for contravention of the Trade Practices Act are as follows:

> A person who engages in a prohibited practice is liable to a pecuniary penalty. The amount of such a penalty is to be determined by the Court having regard to all relevant matters... The maximum amount in the case of a corporation is $250,000 and in the case of a natural person $50,000. Civil proceedings for the recovery of such a penalty may be instituted by the Attorney-General or the Commission (clause 77). Criminal proceedings are not available in respect of a breach of a prohibited practice (clause 78).
>
> Clause 80 provides for an injunction to restrain a person from engaging in a prohibited practice. An application for such an injunction may be made to the Court by the Attorney-General,

the Commission or by any other person.

A person who suffers loss or damage by reason of a prohibited practice may sue in the Court and recover as damages the amount of his loss or damage (clause 82).[29]

II. ADMINISTRATION OF PRESENT ACT

Footnotes

17. *Trade Practices Act* 1974, Section 7(1).

18. *Ibid*., Section 7(2).

19. Organization for Economic Co-operation and Development, *Annual Reports on Developments: Australia*, 1 April 1974 - 31 March 1975. (Committee of Experts on Restrictive Business), p. 4.

20. *Trade Practices Act* 1974, Section 29(1).

21. *Ibid*., Section 88.

22. *Ibid*., Section 92.

23. *Ibid.*, Section 88(1).

24. Australia, House of Representatives, "Trade Practices Bill 1974, Explanatory Memorandum", p. 3.

25. OECD, *op. cit*., note 19, pp. 8-9.

26. *Trade Practices Act* 1974, Section 90(9)(b).

27. OECD, *op. cit*., note 19, p. 3.

28. *Trade Practices Act* 1974, Section 92(2).

29. *Op. cit*., note 24, pp. 12-13.

III. SPECIFIC PRACTICES

Mergers

When proposals which led to the Trade Practices Act 1965 were first made, merger legislation was included. However, the eventual legislation did not include merger provisions. Mr. Snedden, the then Attorney-General, gave these reasons for not including such provisions:

> . . . the problem of controlling mergers and takeovers is one of great complexity. Apart from devising a satisfactory criterion for deciding whether a merger or takeover should be permitted or prohibited, there is the real problem of the mechanics by which a system of control should be implemented.[30]

Richardson notes another reason for the non-inclusion of mergers in the 1965 legislation: namely that not enough was known about their economic effects for legislation to be introduced which could confidently be expected to improve the competitiveness of the Australian economy.[31]

It became evident, however, that merger legislation was necessary. An important merger was announced in the banking field in 1968, and was later effected in 1969. In 1969, a report on takeovers went before the standing committee of Attorneys-General. A significant example of the need for merger legislation occurred after the 1971 decision in the Frozen Vegetables case. The facts and decision in the case were as follows:

> The processors of nearly all the frozen vegetables sold in Australia had made an agreement and two supporting agreements . . . which fixed the wholesale price of their products, the discounts and allowances for the various class of purchasers, including

> distributors . . . Justification for the agreement was claimed in the structure of the industry, including the purchasing power of the chains and groups, and the price war conditions following the very heavy crop of 1969-70.
>
> The (Trade Practices) Tribunal delivered its decision (based on the public interest criteria of the Act) on 6 August 1971, finding the agreements to be contrary to the public interest and making appropriate restraining orders to the parties . . .[32]

After the decision, the parent of one of the companies that had been before the Tribunal acquired another of the companies that had been before the Tribunal and also a third major processor. The same parent company then agreed with yet another company that had been before the Tribunal to combine their total frozen vegetable interests in Australia in a jointly-held company, which became the largest in the country.[33]

In 1972, the Companies (Foreign Take-overs) Act was passed, which regulated the acquisition of shares in Australian corporations by foreign persons. That Act provides for the making of an order prohibiting an acquisition where such acquisition is considered to be contrary to the national interest. The Act also provides for divestiture, under certain conditions, of shares already acquired.[34]

Merger provisions are included in the Trade Practices Act 1974. Recognizing that mergers are not necessarily anti-competitive, the Act states that "a corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate where the acquisition is likely to have the effect of substantially lessening competition in a market for goods or services."[35] That is, only those mergers that are

likely to have the effect of substantially lessening competition are prohibited.[36] The section does not apply where the acquisition of assets of the body corporate is in the ordinary course of business.[37]

The Trade Practices Commission may grant a clearance or authorization in respect of any proposed acquisition.

Moreover,

> The provisions for authorizations in respect of mergers take account of the Companies (Foreign Take-overs) Act 1972-1974. The broad objective is to avoid as far as possible duplication that could be involved in the examination of one merger under two Acts. Clause 89(7) requires copies of certain applications for authorizations in respect of mergers to be furnished to the Minister administering the Companies (Foreign Take-overs) Act. Clause 90(10) requires the Commission to defer consideration of such an application while the applicability of that Act is under consideration and clause 90(11) requires the Commission to authorize a merger that the Minister administering that Act has concluded is in the national interest.[38]

The Commission is empowered to make available "to persons engaged in trade or commerce and other interested persons general information for their guidance" in respect to mergers and other activities.[39]

If a corporation contravenes the section on mergers in the Trade Practices Act, it will be subject to divestiture "of all or any of the shares or assets acquired in contravention of that section".[40]

In determining how the provisions have worked to date, it is useful to note that the OECD reports

that in the determinations to date, the Commission has not usually granted clearance to horizontal mergers unless the assets of the acquisition are of insignificant magnitude.[34]

Monopolization

As noted above, the greater part of business activity in Australia took part in monopolistic or oligopolistic markets. An example of the high level of concentration was in manufacturing, where 19 of the 20 largest firms listed on the Australian Stock Exchanges in 1959 were designated by Karmel and Brunt as monopolists; that is, the eight firm concentration ratio was equal to or greater than 50.[42] This statistic did not include firms which were not listed on the Exchanges, such as subsidiaries of foreign-based firms.

The 1965 Act attempted to alleviate this monopolization somewhat by making monopolization an examinable practice under the designated public interest criteria. Monopolization (which included monopolization of patents, trade marks, designs and copyrights)[43], was said to occur when a person, or persons together, in a dominant position (i.e., a person who controlled one third of the relevant sales market) *took advantage of his dominant position* (italics ours) to:

(a) induce others to refuse to deal with third parties, either *absolutely or except on disadvantageous terms*;

(b) cut prices in order to damage or exclude competitors; or

(c) impose prices or other terms of trading that he would be unable to impose but for his dominant market position.[44]

It is interesting to note that the first case brought before the Trade Practices Commission concerned monopolization, where Tasmanian Breweries

Pty Ltd. was accused of violating (a) and (c) above. After a constitutional battle concerning the powers of the Commission, the brewery ceased its monopolistic practices.

But the monopolistic provisions were criticized. For example, the arithmetical test (i.e., one third of the market) was criticized by Norman. He argued that a firm could engage in one of the three monopolistic practices but, because not in a dominant position as defined in the Act, could avoid charges of monopolization under the Act. This problem could, for example, be severe when a firm, dominant in market A, expanded into market B, where it was not dominant, and engaged in otherwise monopolistic practices. Was not the practice just as adverse to competition when the firm was not dominant as when it was?[45]

The 1974 Act eliminated this arithmetic test. Monopolization now occurs when "a corporation . . . in a position substantially to control a market for goods or services" takes advantage of its power to:[46]

(a) eliminate or substantially damage a competitor;

(b) prevent the entry of a person into the market;

(c) deter or prevent a person from engaging in competitive behaviour.[47]

Substantial control of a market means that a corporation "by reason of its share of the market, or of its share of the market combined with availability of technical knowledge, raw materials or capital, has the power to determine the prices. or control the production or distribution, of a substantial part of the goods or services on that market."[48]

A few problems arise upon examining this section. First, the language used "poses severe interpretive problems and gives use to a rather broad court discretion", thus leaving to the Court's interpretation exactly what is "monopolization".[49] For example, Baxt and Brunt question how the Court will interpret "substantial control of a market". The problem of definition of a "market" may be one area of contention:

> . . . when dealing with a firm that produces glass bottles, does the Court also take into account other types of containers that may compete with bottles in use, e.g. cans? When dealing with a firm that currently produces 100 per cent of a particular chemical or pharmaceutical, does the Court take into account that there are other chemical/pharmaceutical firms that could produce and market the product? Is the market to be assessed by reference to what is produced or what is sold (i.e. after allowing for exports and imports)? In computing the market share of supermarket chains, does one focus upon groceries? If not, just how does one treat the meat, fruit and vegetables, variety items, etc. Is the geographic scope of the market Australia? or local shopping centres? or what? In short, the economist's concept of a market has product, time and geographic dimensions, all of which we would hope the Court would try to take into account.[50]

Another problem is what is meant by "substantial".[51] The authors also criticize the monopolization provisions on other grounds, including the following:

(1) Since substantial market control is a necessity in order to fall under the monopolization provisions, concern is with the "misuse or augmentation of

achieved market power by a corporation - and not its acquisition":[52]

"This cuts back the scope of the clause markedly from S. 2 of the Sherman Act which encompasses additionally two sorts of offence - the acquisition of monopoly power with 'intent' (what is there called 'monopolization'), the attempted and unsuccessful acquisition of monopoly power (what is called 'attempted monopolization'), and combinations/conspiracies to 'monopolize' in this sense."[53]

(2) Large firms which do not have substantial market control are not prevented from engaging in monopolistic practices as defined in the Act:

". . . acts of predation/coercion/exclusion which conceivably are open to a large conglomerate will not be caught unless the firm concerned has substantial market control-somewhere."[54]

(3) The position of certain multinational enterprises is not made clear by the Act:

". . . it is not clear what the position of a multi-national enterprise might be if it possesses substantial market control in a market outside Australia and unsubstantial market control within."[55]

(4) Monopolization cannot be authorized; nor is there provision for clearance. But the practice does not cover agreements or arrangements that have been authorized under other provisions.[56] Thus, business practices, notably exclusive dealing and merger,

> might be authorized, "even though forming part of some larger anti-competitive strategy that the Court might wish to strike down".[57]

It should be noted, however, that the monopolization provisions do not prevent normal competition by large firms, such as when a firm takes advantage of its economies of scale or developed skills.[58]

Monopolization that is "specifically authorized or approved by, or by regulations under" an Act of a State or an Ordinance of a Territory is not subject to evaluation re the provisions of this section on deciding whether a contravention of the Trade Practices Act has taken place.[59]

The monopolization provisions also apply to patents, trade marks, designs, and copyrights.[60]

Price Discrimination

Price discrimination was examinable under the public-interest criteria of the 1965 Act. Section 36(1)(a) made it examinable to obtain or attempt to obtain, by threat or promise, discrimination or favourable treatment in connection with the acquisition of goods (not of services).[61]

Two weaknesses of this section should be noted. The first was that it only applied to the person who obtained or who attempted to obtain the discrimination; it did not apply to the person who offered or attempted to offer to discriminate. The second weakness was that the discrimination had to be obtained by threat or promise to be examinable; discrimination without such threat or promise was not examinable.

These weaknesses have been alleviated with the 1974 Act. Both the granting and obtaining of prices

which discriminate between purchasers of goods is prohibited, and no longer does there have to be a threat or promise. Discrimination is prohibited when it "is of such magnitude or is of such a recurring or systematic character that it is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods".[62] Discrimination occurs in relation to:

(a) the prices charged for the goods

(b) any discounts, allowances, rebates or credits given in relation to the supply of the goods;

(c) the provision of services or facilities in respect of the goods; or

(d) the making of payments for services or facilities provided in respect of the goods.[63]

Reasonable discrimination due to cost differences in manufacturing, distributing, selling or delivering goods does not constitute price discrimination.[64] Nor does discrimination caused, in good faith, by meeting competition.[65]

There is no provision for authorizations and clearances in relation to price discrimination.

Specialization Agreements

A specialization agreement is taken for discussion purposes in this section to be "an agreement or arrangement between or among two or more persons whereby one or more of such persons undertakes to discontinue producing or supplying a commodity or service or a range of commodities or services".[66] The result of such an agreement would be lower costs, which should be reflected in lower

prices or better products.

Specialization agreements as defined above are nowhere mentioned in the Australian legislation. However, they would be caught by Section 45 of the Trade Practices Act 1974 as being a contract, arrangement or understanding in restraint of trade, provided they had a significant effect on competition. In that event, they could still be the subject of an authorization[67] (see above). In considering an application for an authorization in the case of a specialization agreement,

> . . . the Commission would have regard to the fact that such an agreement would to a greater or lesser extent be a market sharing scheme designed to give the parties a monopoly in the particular line of business allocated to them by the agreement. The parties might have a difficult time showing that any benefits flowing from such specialization were in fact benefits to the public rather than merely benefits to the parties. It could well be that a specialization agreement could have a potential for cost savings, but unless some competition remained in the field, those benefits might not find their way to the public in the form of lower prices and it is the public to whom the Commission must have regard.[68]

Export Agreements

Under the Trade Practices Act 1965, no special provision was made for agreements among Australian exporters governing price, output, territories or joint selling arrangements for export purposes.[69] However, the "needs and interests of . . . exporters" was one of the considerations to be taken into account by the Trade Practices Tribunal when examining a restrictive activity under the public interest criteria of the Act.[70] Moreover, it was noted that the interests of other individuals might

be affected by an export agreement, and thus there would be this further justification as well for the agreement to be examinable under the Act:

> The freedom of the individual Australian exporter to compete with the other is restrained and even though the restrictions might be accepted voluntarily, the result may sometimes be that the aggregate volume of exports is less than might have been won under free competition. Foreign markets that might have been explored under the competitive spur, may be ignored. Further, the concerted withdrawal of goods from the Australian market to meet foreign demands, or the reduction of export prices to meet overseas competition, might lead to increases in the domestic price of the product. In some cases, also, the export association may be used more deliberately as a vehicle for domestic price and output manipulation.[71]

Despite these considerations, however, export agreements[72] are now exempt from the provisions of the <u>Trade Practices Act</u>. The 1974 legislation states that

> regard shall not be had . . . to any act or thing that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, being an act or thing done in pursuance of an agreement of which full and accurate particulars were furnished to the Commission before the act or thing was done.[73]

Thus, a restrictive agreement that is also an export agreement is legal if particulars of the agreement have been furnished to the Trade Practices Commission before the activity was undertaken.

A problem seems to arise when an agreement is not a pure export agreement, that is, paraphrasing the Act, one which does not relate <u>exclusively</u>

(underlining ours) "to the export of goods from Australia or to the supply of services outside Australia". It would seem that very few export agreements would be so exclusive. Presumably, agreements which were not pure export agreements would fall within the realm of the Act. That is, they would be judged as regards the provisions re mergers, monopoly, and the like.

Delivered Pricing

For the purposes of discussion in this section, delivered pricing is taken to be:

> the practice of refusing to permit a purchaser of a commodity to take delivery thereof
>
> (a) at any place at which the supplier keeps the commodity for sale, at the price for delivery at that place, or
>
> (b) at any point to which the supplier will deliver, at the price for delivery at that point,
>
> whichever is lower.[74]
>
> Delivered pricing does not occur:
>
> where the refusal is based only on the failure of the purchaser to observe such reasonable conditions as the supplier imposes on purchasers generally relating to
>
> (a) the notice to be given by the purchaser of his intention to attend for delivery,
>
> (b) the unit or quantity in which delivery must be taken, and delivery of the commodity.[75]

Delivered pricing is not covered in the Australian Trade Practices Act 1974 and as long as it was not the result of an agreement among competitors and did not constitute price discrimination as defined in that Act, it would seem that that Act did not reach it at all.[76]

III. SPECIFIC PRACTICES

Footnotes

30. Quoted in J.P. Nieuwenhuysen, ed., Australian Trade Practices: Readings, (F.W. Cheshire Publishing Pty. Ltd., 1970), p. xi.

31. J.E. Richardson, "The 1965 Bill: The Legal Framework" in Nieuwenhuysen, Ibid., p. 228. (Reprinted from Economic Record, September 1965).

32. Commonwealth of Australia, Commissioner of Trade Practices, Fifth Annual Report, 1972, p. 7.

33. Ibid., pp. 7-8.

34. OECD, op. cit., note 19, p. 20.

35. Trade Practices Act 1974, Section 50(1).

36. Senator Lionel Murphy, "The Trade Practices Legislation", (paper presented to a seminar sponsored by the Australian Association of National Advertisers, Sydney, August 23, 1974).

37. OECD, op. cit., note 19.

38. Explanatory memorandum, op. cit., note 24, p. 11.

39. Trade Practices Act 1974, Section 28(1)(a).

40. Ibid., Section 81.

41. OECD, op. cit., note 19, p. 12.

42. Karmel and Brunt, op. cit., note 3, pp. 57-60.

43. Trade Practices Act 1965, Section 39(6).

44. Ibid., Section 37(1), and George G. Masterman and Ezekiel Solomon: Australian Trade Practices Law, (Butterworths, Sydney-Melbourne-Brisbane, 1967) p. 40.

45. N.R. Norman, "Concentration Ratios and Trade Practices in Australia", in Nieuwenhuysen, op. cit., note 30, p. 63 and p. 65.

46. An otherwise monopolist who does not take advantage of his power is not guilty of an offense.

47. Trade Practices Act 1974, Section 46(1). This includes the case when the corporation "and any related corporations . . . are together in a position substantially to control" a market. Section 46(2).

48. Ibid., Section 46(3).

49. Baxt and Brunt, op. cit., note 15, p. 19.

50. Ibid., p. 20.

51. Ibid.

52. Ibid., p. 19.

53. Ibid., p. 19.

54. Ibid., p. 20.

55. Ibid.

56. Trade Practices Act 1974, Section 46(4)(b).

57. Baxt and Brunt, op. cit., note 15, p. 19.

58. K. Enderby, speech made during second reading of Trade Practices Bill. July 16, 1974.

59. *Trade Practices Act* 1974, Sections 51(1)(b) and 51(1)(c).

60. *Ibid*., Section 51(1)(a).

61. *Trade Practices Act* 1965, Section 36(1)(a); Masterman and Solomon, *op. cit*., note 44, p. 39.

62. *Trade Practices Act* 1974, Section 49(1).

63. *Ibid*., Section 49(1).

64. *Ibid*., Section 49(2)(a).

65. *Ibid*., Section 49(2)(b).

66. This was the definition used in Bill C-256, Section 2.

67. Letter from G. de Q. Walker, Assistant Commissioner, Policy, Planning and Research Branch, Trade Practices Commission to Robert Dale, August 6, 1975.

68. *Ibid*.

69. Masterman and Solomon, *op. cit*., note 44, p. 357.

70. *Trade Practices Act* 1965, Section 50(2)(a).

71. Masterman and Solomon, *op. cit*., note 44, p. 358.

72. An export agreement is taken by the author for this purpose to mean an agreement or arrangement between or among two or more persons in Australia that relates only to the export of commodities from Australia or to the supply of services outside Australia and to any matters that are reasonably necessary to such export or supply. This was the definition used in Bill C-256.

73. *Trade Practices Act* 1974, Section 51(2)(g).

74. Bill C-256, Section 42(1).

75. *Ibid*., Section 42(2).

76. Walker, *op. cit*., note 67.

APPENDIX

PUBLIC-INTEREST CRITERIA - TRADE PRACTICES ACT 1965, SECTION 50.

The public interest -(1) In considering whether any practice other than a practice of monopolization, is contrary to the public interest, the Tribunal shall take as the basis of its consideration the principle that the preservation and encouragement of competition are desirable in the public interest, but shall weigh against the detriment constituted by any proved restriction of, or tendency to restrict, competition any effect of the restriction or practice as regards any of the matters referred to in the next succeeding sub-section if that effect tends to establish that, on balance, the restriction or the practice is not contrary to the public interest.

(2) The matters that are to be taken into account in accordance with the last preceding sub-section are:

(a) the needs and interests of consumers, employees, producers, distributors, importers, exporters, proprietors and investors;

(b) the needs and interests of small businesses;

(c) the promotion of new enterprises;

(d) the need to achieve the full and efficient use and distribution of labour, capital, materials, industrial capacity, industrial know-how and other resources;

(e) the need to achieve the production, provision, treatment and distribution, by

efficient and economical means, of goods and services of such quality, quantity and price as will best meet the requirement of domestic and overseas markets; and

(f) the ability of Australian producers and exporters to compete in overseas markets.

(3) In considering the public interest in relation to a practice of monopolization, the Tribunal shall weigh against any detriment (including detriment constituted by any proved restriction of, or tendency to restrict, competition) that has resulted, or can be expected to result, from the practice or any effect of the practice as regards an of the matters referred to in paragraphs (a) to (f) of the last preceding sub-section if that effect tends to establish that, on balance, the practice is not contrary to the public interest.

BIBLIOGRAPHY

Australia, House of Representatives: "Trade Practices Bill 1974, Explanatory Memorandum".

The Australian National University - Centre for Continuing Education: Monopolies, Mergers and Restrictive Trade Practices: An examination of federal legislation, Compiled by L. Moran, November 1972.

Baxt, Robert, and Brunt, Maureen: "The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means", Australian Business Law Review, Vol. 2, No. 1, April 1974, pp. 3-79.

Commissioner of Trade Practices, Annual Report Commonwealth of Australia, Years Ended June 30, 1968 to June 30, 1974 inclusive.

Commonwealth of Australia: Report from the Joint Committee on Constitutional Review, 1959.

Economic Council of Canada: Interim Report on Competition Policy, Queen's Printer, Ottawa: 1969.

Enderby, K., speech made during second reading of Trade Practices Bill, June 16, 1974.

Freeth, Hon. G., speech on Restrictive Trade Practices from the Parliamentary Debates, 6th December 1962.

House of Commons, Canada, Bill C-256 (The Competition Act) First Reading, June 29, 1971.

"Initial Activity Under the Australian Trade Practic Act", _Antitrust Bulletin_, Volume 14, 1969, pp. 705-736.

Karmel, P.H., and Brunt, Maureen: _The Structure of the Australian Economy_, F.W. Cheshire Melbourne: Canberra: Sydney: 1962.

Masterman, George G., and Solomon, Ezekiel: _Australian Trade Practices Law_; Butterworths, Sydney-Melbourne-Brisbane, 1967.

Murphy, Senator Lionel: "The Trade Practices Legislation", paper presented to a Seminar sponsored by the Australian Association of National Advertisers, Sydney, August 23, 1974.

Murphy, Senator Hon. L.K., Q.C., Attorney-General and Minister for Customs and Excise, Speech on Trade Practices Bill. Second Reading, Parliamentary Debates, 30 July 1974.

Nieuwenhuysen, J.P., editor: _Australian Trade Practices: Readings_, F.W. Cheshire Publishing Pty Ltd., 1970.

Norman, N.R. "Concentration Ratios and Trade Practices in Australia" in Nieuwenhuysen, J.P. editor (see separate entry), pp. 48-74.

O.E.C.D. Committee of Experts on Restrictive Busines "Annual Reports on Developments; Australia", 1 April 1974 - 31 March 1975 (paper; forthcoming in book form).

Pengilley, Warren: "Australian Experience of Antitrust Regulation - A Vindication of the _Per Se_ Approach", _Antitrust Bulleti_ Volume 18, 1973, pp. 355-374.

Pengilley, Warren: "Comments on Arguments in Justification of Agreements in Restraint of Trade - the United Kingdom, Australian and New Zealand Experience", _Antitrust Bulletin_, Volume 19, 1974, pp. 257-275.

Pengilley, Warren J: "The Prospective Restrictive Practices Act of Australia", _Antitrust Bulletin_, Volume 10, 1965, pp. 155-173.

Restrictive Trade Practices Act 1971-1973.

Richardson, J.E.: "The 1965 Bill: The Legal Framework" in Nieuwenhuysen, J.P. (see separate entry), pp. 212-230. Reprinted from _Economic Record_, September 1965.

Trade Practices Act 1965-1971.

Trade Practices Act 1974.

Walker, Dr. Geoffrey de Q.: "Competition Policy and the Corporation", in Lindgren, K.E., Mason, H.H., and Gordon, B.L.J., editors: _The Corporation and Australian Society_; The Law Book Company Limited, Sydney-Melbourne-Brisbane: 1974.

Dr. G. de Q. Walker, Assistant Commissioner, Policy, Planning and Research Branch, Trade Practices Commission, letter to Robert Dale, August 6, 1975.

Western Australia: _Report of the Honorary Royal Commission on Restrictice Trade Practices and Legislation_, Perth, 1958.

JAPAN

COMPETITION POLICY AND PRACTICES

by

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PREFACE

The main purpose of this paper is to provide information on the existing antitrust legislation in Japan and its administration while providing commentary on major shifts in the legislation and the resultant public opinion and controversy if applicable. The focus of our attention is on selected parallel aspects of competition policy under consideration in Stage Two of the amendments to the Canadian Combines Investigation Act. Those areas examined are: monopolization; mergers; price discrimination; specialization agreements; export agreements; interlocking directorates; and delivered pricing. Prior to any detailed analysis of these restrictive practices, the development of the Japanese Antimonopoly Act is discussed from its original enactment up until the most recent proposals for revision.

Although not noted in the topics listed above, cartels are discussed in some length due to the tremendous importance and acceptance of this practice in the industrial growth of Japan. Cartels, as the Japanese answer to their problems of excessive competition domestically and fierce competition internationally, become an important element in the analysis of monopolization, specialization agreements and export agreements.

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I. DEVELOPMENT OF THE JAPANESE ANTIMONOPOLY ACT

Japan's original Antimonopoly Act[1] was enacted in April 1947 and as amended is the core of Japan's present competition policy. As prescribed under the Occupation Authority, the original statute was patterned on the provisions of the Sherman Act, the Clayton Act and the Fair Trade Commission Act of the United States. The enforcement agency, the Fair Trade Commission,[2] is a quasi-judicial body, which investigates, recommends corrective action, issues formal complaints, hears cases, and issues formal decisions and orders as outlined in the Act.[3]

Prior to the enactment of the Antimonopoly Act, Japan's economic power was concentrated in the hands of the powerful Zaibatsu combines.

> Through the device of holding companies and subholding companies, control of virtually the entire enterprise of Japan centered in some 15 groups... Monopoly in Japan did not confine itself to single industries but built its power by combining together sizable portions of the major industries of the country.[4]

Designed in a fashion to dissolve the strong interlocking relationships among the Zaibatsu, the Antimonopoly Act of 1947 was found to be very stringent and foreign by Japanese businessmen, as any earlier industrial legislation and policy was largely influenced by European (i.e. German) legislation. As a result, major amendments were undertaken in 1949 with the purpose of correcting the overshooting of the aim of the occupational authority. The major points of the amendment were as follows:

(a) Company may hold stock of other companies which does not compete with oneself, so far as such stockholding does not substantially lessen competition

(Amendment to section 10).

(b) Company may hold debenture of other company so far as it does not substantially lessen competition (Deletion of section 12 and Amendment of section 10).

(c) Interlocking directorate between companies not in competitive relationship permitted (Amendment to section 13).

(d) Approval system on international contracts changed to post notification system (Amendment to section 6).

(e) Approval system on mergers or transfers of business changed to prior notification system (sections 15 and 16).[5]

With the signing of the Peace Treaty in 1952, the revision of the Antimonopoly legislation became a lively issue and began what has been termed "the erosion of Antimonopoly Policy in Japan".[6] As the first step in regaining her industrial strength, Japan, influenced by a West German Government Bill, undertook a major revision of the <u>Antimonopoly Act</u> in 1953. In particular, this revision exempted depression cartels, rationalization cartels and export cartels under certain conditions from the prohibition of cartels in general. Other major points included:

(a) Deletion of the provision of prohibition of concerted activities (section 4).

(b) Deletion of the provisions of prohibition of establishment of private control organization (section 5).

(c) Deletion of the provision of restriction on undue substantial disparity in economic power (section 8).

(d) Deletion of the provision of restriction on holding debenture (section 10 (1)).

(e) Stockholding, interlocking directorate, merger or transfer of business were restricted only when they may substantially restrict competition, or when unfair business practice is employed (Part IV).

(f) "Unfair methods of competition" was changed to "unfair business practices", and the abuse of one's predominant bargaining position was added (section 2(7)).

(g) Resale price maintenance contract may be approved under certain conditions (section 24-2).

(h) The Trade Association Act was abolished, and provisions therein restricting trade association activities concerning cartel resolutions, etc., were added to the Antimonopoly Act (New section 8).[7]

Unexpected public opposition led by the Press developed against the 1953 Revision and succeeded in forcing a change that gave the right to cartel approval to the Fair Trade Commission (FTC) rather than the Ministry of International Trade and Industry (MITI). As a result, MITI stepped up its policy of administrative guidance by ordering production curtailment in major industries.[8] The Commission declared that such action constituted a violation of the law and advised the Ministry to rescind its orders. The Ministry did not agree and continued supporting industry against the FTC, despite the fact that its policy was clearly in contravention of the spirit, if not the letter, of the law.

Further major amendments were attempted in 1957 and 1962 to make it easier to obtain FTC's approval for cartels and mergers. In 1957, the Antimonopoly Act Review Committee proposed:

> In the current status of the nation's economy, where there are facts that many enterprises are suffering from excessive competition under the Antimonopoly Act, the provisions of the Antimonopoly Act cannot be said to be thoroughly suitable for the sound development of the nation's economy, when viewed in the light of long range policy to promote stable development of the economy in the future severe international competition, and it should be amended.[9]

However, by this time the ideas behind the competition legislation had been fully accepted by general consumers, small and medium entrepreneurs and academics and the recommendations never found enough support even to be discussed. Nevertheless, enforcement of the Antimonopoly Act around 1958 was considered extremely passive.[10] In 1962, MITI attempted to introduce a Bill exempting specially designated industries from the application of the Antimonopoly Law. Again, led by the FTC, strong opposition developed which proved to be successful in defeating this attempt. Even business organizations had misgivings, fearing it would result in an economy controlled by bureaucracy.

The apparent strength and sweep of the Antimonopoly Act, however, has been greatly reduced by exemptions from prohibitions under the Antimonopoly Act included in such separate legislation as: Marine Transportation Act (1949); Export and Import Trading Act (1952); Small and Medium-Sized Enterprise Organization Act (1957).

Further erosion has occurred since 1954 when MITI adopted the strategy of leaving the Antimonopoly Act alone, lest it cause a public outcry and stir up opposition against revision, and concentrated on enactment of special legislation exempting industry from the controversial provision of the law.

In 1975, a further revision of the Antimonopoly Act was being prepared by the government to submit to the Diet (Parliament) for approval. This revision is based on proposals made public by the FTC in September 1974:

> The FTC proposal contains nine major measures to deal with 1) illegal cartels, 2) strong oligopolies, and 3) overconcentration of economic power. To penalize illegal cartels, heavier fines, imposition of forfeiture levies, and FTC authority to order price roll-backs are proposed. For prevention of unfair actions by strong oligopolies, disclosure of production costs, split-up of business, and assignment of marketing rights are postulated; and for guarding against overconcentration of economic power the FTC would have the Anti-Monopoly Law impose specific limits on business corporation ownership of corporate stock.[11]

This appears to be a switch in the direction of strengthening the Antimonopoly Act in the rise of concentrated industrial groupings.

I. DEVELOPMENT OF THE JAPANESE ANTIMONOPOLY ACT

Footnotes

1. The full title of the Act is: Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade.

2. For a more complete discussion of FTC's role see Hiroshi Iyori, Antimonopoly Legislation In Japan (Federal Legal Publications, New York, 1969), pp. 93-98.

3. See Organization for Economic Co-operation and Development, Guide to Legislation on Restrictive Business Practices (Paris, 1971) vol. III, Japan, section 2.0, pp. 11-13.

4. See Eleanor Hadley, "Trust Busting in Japan", in Harvard Business Review (July 1948), p. 428.

5. See Hiroshi Iyori, op. cit., note 2, p. 18.

6. See Kozo Yamamura, "The Development of Antimonopoly Policy in Japan: The Erosion of Japanese Antimonopoly Policy, 1947-67", in Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary U.S. Senate: Concentration Outside the U.S. (90th Congress, 2nd Session, Part 7A), pp. 4273-4287.

7. See Hiroshi Iyori, op. cit., note 2, p. 22.

8. See Chitoshi Yanaga, Big Business in Japanese Politics (Yale University Press, London, 1968), p. 157.

9. See Hiroshi Iyori, op. cit., note 2, p. 22.

10. Ibid., p. 23.

11. See article, "Antimonopoly Law Revision", The Oriental Economist, (March 1975).

II. ADMINISTRATIVE AND JUDICIAL MACHINERY

The Fair Trade Commission, created to achieve the purpose of the Antimonopoly Act, has, as an independent administrative agency, the power to exercise a quasi-legislative power and quasi-judicial power in addition to administrative power. Section 45 of the Act provides that the Commission will investigate a case when it receives a report from any individual who considers that a violation of the Act exists and thereby asks that the necessary measures be taken. Section 45(3) further stipulates that the Fair Trade Commission may, when it considers that a violation of the Act exists, take suitable measures upon its own authority.

If the Commission does find that a violation of the Act exists, it may issue a recommendation that the person concerned in such violation take appropriate measures (section 48(1)). Failing this, or in the public interest, the Commission may issue a complaint in the case and open a formal hearing. However, one may avoid formal hearings by way of a consent decision as provided for in section 53(3). Provisions under section 60 of the Act also provide that any government agency or public organization concerned with a case may, if it deems necessary in the public interest, become a party to the proceedings with the approval of the FTC.

Appeals are provided for under sections 67 and 87 of the Act whereby any person dissatisfied with the decision of the FTC may file a suit for revocation of the decision with the Tokyo High Court. Cases may be further appealed to the Supreme Court.

III. SPECIFIC PRACTICES

Monopolization

Monopolization Under The Antimonopoly Act. Japan prohibits "private monopolization" under section 3 of the Antimonopoly Act which reads: "No entrepreneur shall effect private monopolization or any unreasonable restraint of trade." The term "private monopolization" as used in this Act is not an identical term with monopoly as normally defined in economics.[12] Private monopolization implies artificial activities of one or more entrepreneurs to form, maintain or strengthen a monopolistic position. The Act itself defines private monopolization as:

> such business activities, by which any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.[13]

In this regard, the O.E.C.D. paper on "Market Power and the Law" commented:

> The cases brought before the Fair Trade Commission indicate that, contrary to the situation in the United States and possibly in Canada, the measures taken against private monopolization are not primarily directed against the deliberate possession of monopoly power but against specific acts of the 'monopolist'.[14]

The specific acts of monopolists most likely to violate the provisions of private monopolization are those of "exclusion" where they may cause

"substantial restraint of competition". Dumping, discriminatory pricing, exclusive dealing, or controlling necessary resources for manufacturing or selling are the most frequent methods of activities employed to effect "exclusion".[15] The two major series of amendments, in their effect on the enforcement of the prohibition of private monopolization, have been directed at the tools of monopolizing, i.e. mergers, stockholding, intercorporate directorates etc.. In general the Fair Trade Commission has had to deal with very few cases involving section 3. Where it has, such things as horizontal-price fixing and stockholding combined with interlocking directorates have been involved.

The biggest concern today for FTC officials and Antimonopoly Legislation is the rising dominance of so-called General Trading Companies. Prior to the enactment of the 1947 Antimonopoly Act, the Japanese economy was controlled in large measure by the immense Zaibatsu combines. The trend among city banks, which has alarmed Commission officials, has been to form new enterprise groupings around the leading enterprises, i.e. General Trading Companies. The Fair Trade Commission calls these subsidiary groupings "Capital Keiretsu":

> In the case of capital Keiretsu, parent-company ownership is high, management interlocks are numerous, and credit extension is frequent. Although article 9 of the Antimonopoly Law forbids holding companies, and articles 10 and 13 forbid intercorporate stockholding and interlocking directorates where the effect is 'substantially to restrain competition,' these provisions have not impeded the buildup of subsidiary complexes of market-related, as well as non-market-related firms.[16]

However, Hadley, writing in 1970, did not see any basis for alarm:

> In today's groupings there are no Zaibatsu-family holdings, and holding companies do not exist, what remains are 'cross-subsidiary' ties, as it were.[17]

She continues:

> ... these group ties are but a shadow of their former strength and furthermore, they are ties between firms ostensibly equal, not between a holding company that is above the others. Today's unity of action rests on cooperation which stems from common trade names and trademarks and a long tradition of collective action.[18]

By June 1973, however, these general trading companies had reached such prominent positions, that the Fair Trade Commission felt compelled to undertake an investigation of the six major trading companies.[19] This investigation was considered warranted due to the fact that by taking advantage of their diverse functions as trading companies and their huge capital, they had expanded their operations in the following manner:

1. Vigorously extended their control over enterprises with which they have business dealings;

2. Vertically organized the entire process of importing raw materials and marketing of manufactured products;

3. Brought together the interrelated entrepreneurs, and became the propelling force behind the mammoth projects for the development of resources, etc.[20]

Of particular concern to the Commission was the increase of stockholding activity by the six companies and the policy of sending executives to participate in the management of these companies,

thereby increasing the grouping structure. However, in their report in January 1974, they concluded that immediate action was not necessary:

> At the present time, it is not felt that the enterprise groupings belonging to The Six have yet reached the position of having concentrated excessive economic powers similar to the old Zaibatsu, but if the three groups belonging to the old Zaibatsu tighten their unity a step further and lead the other three groups to consolidate and expand their groupings the competitive order in a very important field of our national economy will be damaged.[21]

In 1975, the government is preparing to submit a revision of the Antimonopoly law to the Diet for approval.[22] The revisions provide (a) for the partial break-up of companies commanding monopolistic or oligopolistic market shares and (b) strict limits on shareholdings in other firms.

Exemptions, Government Regulation, and Administrative Guidance. The Antimonopoly Act as currently enforced, provides for exemption of natural monopolies under section 21 of the Act:

> The provisions of this Act shall not apply to such acts relating to the production, sale, or supply as are done in the proper course of business by a person engaging in a railway, electricity, gas, or any other enterprise constituting a monopoly by the nature of the said business.

In addition, there are separate Acts concerning transportation, insurance, warehousing, the alcoholic beverages and silk-reeling industries, which provide exemption, under certain conditions, from the application of the Antimonopoly Act.[23]

In general, Eleanor Hadley finds that Japanese government officials believe business to be incapable of making satisfactory decisions by itself, and that it is essential for government to provide guidance on virtually every aspect of operation.[24] Most of this control is not expressed in legal enactments, but in administrative action, or in even less definable "guidance" and "persuasion".

The Japanese Government itself does not own a significant share of Japan's industry, but this does not inhibit it from playing a major role in the Japanese economy. Essentially government enterprise is limited to activities in transportation, communication and banking. However, government influence and intervention in industry has often brought the Fair Trade Commission, as administrator of the Antimonopoly Act, and the Ministry of International Trade and Industry, as administrator of Japanese industrial policy, into deep conflict. Industrial policy encourages mutual persuasion, collaboration, and mergers among firms whereas antitrust legislation calls for the prosecution of those engaging in collusion and mergers in restraint of competition. The government, through MITI, three times unsuccessfully sought Diet authorization for a stronger voice in "specified industries".[25] Each time they lost because of the opposition mounted by the Fair Trade Commission with consumer and small business support.

Unsuccessful at this approach, the government has attempted to effect their influence through such devices as lending and tax favours. However, more importantly, it has assured itself a key position through the device of administrative guidance, which amounts to government sponsored cartelization. Japanese business has come to welcome certain instances of government intervention or participation in the decision-making process.

This is particularly so because of antimonopoly constraints without which it might have been difficult to reach the kind of industry-wide agreement necessary for many business decisions in Japan.[26]

Concerning this unique government-industry relationship, Hadley has remarked:

> The low esteem in which the market mechanism is held, and the absence of fear of the abuse of power, are but facets of the different orientation to political economy that one finds in Japan.
>
> ...In as much as efficiency is uncritically associated with larger and larger firm size, there tends to be the view that the higher the market concentration the greater the effective use of resources. In Japanese conservative opinion it is the government which steers, with producers the vital agents. Accordingly, the orientation of thinking is toward 'producer satisfaction', not 'consumer satisfaction'.[27]

There has been considerable debate in Japan concerning government regulation and intervention in the economy, to the point that the country has been labeled "Japan Inc. - the total conglomerate".[28] This designation has appeared through the international observation of the close communication between the business community through its various industry associations, federations, and government departments.[29] By international comparison government influence has been described as follows:

> ... no other private enterprise economy approaches the same degree of government control of business.[30]

At the local level, in a more current commentary,

a professor at Osaka University compared the competitive oligopoly of the 1960's to the co-operative oligopoly of the 1970's.[31] He speaks of an "idiotic insensibility to the Antimonopoly Law"[32] - namely, a sentiment that voluntary control is good, bureaucratic control bad. In closing he remarks:

> If their theory of voluntary control (unlawful cartels) is easily wed to the government's theory of cooperation between officials and private quarters, there is the great danger of priority to politics over economics, a march toward a 'controlled economy' and ultimately, the end of the market system and civil liberty.[33]

Monopolization and Intellectual Property. Like other industrialized countries, a Japanese patent (issued under section 68 of the Patent Act) gives the patentee the exclusive right to make commercial use of the patented invention. Specific exemptions to such industrial property rights are provided for in the Antimonopoly Act under section 23:

> The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, and the Trademark Act.

However, the Antimonopoly Act is still applicable to such acts as are not regarded to be within the scope of the exercise of industrial property rights. The Act itself contains no provision defining the acts within the scope of the exercise of these rights and therefore, what is the legitimate use of these rights must be determined in each individual case. Alleged misuse of the exercise of industrial property rights arose in a case involving restrictions on exports of a patented article.[34] The Tokyo High Court held that a

patentee had the exclusive right to use a patented invention only within the limits of the natural territory. Restrictions on exports of patented products, therefore, exceeded the scope of the patentee's exclusive rights.

In the area of intellectual property, the Japanese Antimonopoly Act is particularly concerned with International Licensing Agreements and their application to section 6(1) of the Act:

> No entrepreneur shall enter into an international agreement or an international contract which contains such matters as constitute unreasonable restraint of trade or unfair business practices.

This provision is reinforced by a reporting requirement that all international agreements (conventions or contracts) must be reported to the Fair Trade Commission within 30 days.

The importance of this provision rests on the fact that acquisition of advanced technology has been a prime concern of Japanese industrial development. The importance of such licensing agreements was recognized in 1949 when section 6 was significantly amended.[35] Prior legislation had prohibited any entrepreneur from entering "an agreement or a contract relating to restriction of exchange of scientific or technological knowledge or information necessary for business activity." This was deleted to encourage any foreign capital inflow likely to result from patent-licensing or exclusive-dealing agreements between Japanese and foreign firms. In addition, all discriminatory clauses against foreign firms were eliminated to place such firms on an equal footing with any Japanese firm. Original validation agreements were replaced by a post facto notification to the Commission.

In June 1968, regulations for the introduction of technology were liberalized with all scrutiny to be carried out under section 6 of the Antimonopoly Act instead of under the Foreign Investment Act.[36] To help businessmen, the Fair Trade Commission published enforcement guidelines (see Appendix A) on international technological licensing thereby clarifying the examination standards of the Commission about typical or outstanding "unfair trade restraints or unfair trade practices".[37] In enforcing section 6:

> ....the F.T.C. does not take formal action immediately upon finding a violative clause in the contract filed. In its screening process, it advises the Japanese partner to change or delete the clause concerned. Usually, negotiations for changing such a clause will require several months or even a year. The F.T.C. is prepared to be patient for a reasonable period of time, but if corrective action is unreasonably delayed, it will initiate formal action against the Japanese party.[38]

In addition, the Fair Trade Commission is concerned about unpatented "know-how".[39] Its concern is that the patentee may abuse his rights by restriction on the use of "know-how" upon the termination or expiration of a contract. Section 23 of the Antimonopoly Act contains no explicit reference as to whether or not it would apply mutatis mutandis to "know-how" licensing. However, the Antimonopoly Act Guidelines for Agreements Introducing Foreign Technology, state:

> Restrictions in international know-how licensing agreements will be treated in the same manner as those in international licensing agreements on patent rights or utility model rights.[40]

Therefore, the Commission has held that clauses in international contracts prohibiting the production, sale or handling of a particular product by Japanese parties after the termination of the contract constituted unfair business practices.

Cartels And Export Agreements

Domestic Cartels. In establishing quotas, curtailing production, allocating markets and fixing prices, cartels are prime vehicles of monopolization. Moreover, the Japanese approach to this problem is relevant to their treatment of export agreements. In the original Antimonopoly Law, as prescribed by the occupation forces, cartels were banned outright through provisions found in articles 3,4,5 and 6.[41] It was not until 1953 when Japan had regained her own guiding hand that amendments were made to remove the *per se* tests of illegality through the deletion of articles 4 and 5 relating to concerted activities and establishment of a private control organization, and two categories of cartels, anti-depression and rationalization, were specifically authorized through additions to article 24 (see Appendix B). The Fair Trade Commission was authorized to permit a cartel to overcome a recession or when a cartel was indispensable for a certain type of business rationalization. However, very few cartels were formed in this manner as various Acts were passed to create cartels as exemptions to prohibitions under the *Antimonopoly Act*. Cartels formed under the *Antimonopoly Act* were cumbersome and required FTC approval whereas cartels formed under special legislation merely required that the appropriate minister consult with the Fair Trade Commission. Cartels in general were established through special legislation:

a) when necessities arose to stabilize a public interest enterprise,

b) to streamline petty enterprises,

c) to maintain orderly international trade.[42]

Various limitations are recognized in the formation of such cartels:

1. should remain in the narrowest range as possible.

2. render no harm to the interests of general consumers and related industries.

3. refrain from excessive discrimination.

4. place no restrictions to those willing to join or withdraw from cartel.[43]

A further device, employed to effect cartelization in the purely domestic market, is the "recommended restriction of production" whereby an official of one of the ministries, usually the Ministry of International Trade and Industry, recommends to each of the firms in an industry that it observe certain restrictions on its production or pricing practices.[44] These may be called administrative guidance cartels. As to the effective enforcement of these suggestions, Hadley feels that although no law is applied, these suggestions are effective depending whether producers think too much time and expense would be engaged in fighting off official pressure and producers may feel long-run interests would be in their favour if they co-operate.[45]

Arguments in favour of cartelization have been widespread. In 1958 the Restrictive Practices Study Team of the Japan Productivity Center commented:

> faith in the benefit of this (the cartel) way of regulating competition is too deep-rooted that the general run of businessmen appear simply unable to comprehend why its legality should be called into question.[46]

The President of the Yawata Iron and Steel Company reflected an apparently widespread view that:

> The means of production are not in the hands of the state but in the hands of private business. Consequently, those who own the means of production can come together and agree not to produce anything useless or agree to adjust supply and demand. This is my idea of independent self-regulation. It is inconceivable that this should be forbidden by the Antimonopoly Law, since the freedom to make contracts and agreements is guaranteed by the Constitution. It is my opinion therefore that the Antimonopoly Law is unconstitutional, since it unduly restricts this freedom.[47]

In general Japanese critics have found cartels to be synonymous with oligopoly. Professor Rotwein, testifying before a U.S. Senate Subcommittee characterized voluntary cartels as outright licenses to engage in restrictive practices.[48]

Export Agreements and Cartels. In general, the international business activities of Japanese entrepreneurs are regulated by section 6 of the Antimonopoly Act. However, export cartels and other restrictive export agreements may be exempted from the provisions of this Act through the special legislation of the Export and Import Trading Act (1952).[49] Under section 5 of this Act:

Exporters may enter into an agreement on price, quantity, quality, design, or any other matter in relation to commodities of a particular kind to be exported to a specific destination, by notifying the Minister of International Trade and Industry within ten days from the day of its conclusion.

Provided that the following conditions have been met (section 5-bis):

i) There is no fear of violating treaties and other arrangements concluded with foreign government or the international agencies;

ii) The interest of importers or enterprises concerned at the destination is not injured and there is no fear of gravely injuring international confidence in Japanese exporters;

iii) In addition to the preceding two paragraphs, there is no fear of injuring the sound development of export trade;

iv) Its contents are not unjustly discriminatory;

v) The participation in or the withdrawal from the agreement is not unjustly restricted;

vi) There is no fear of unjustly injuring the interests of domestic agriculture, forestry and fishery enterprises concerned, smaller enterprises concerned and other enterprises concerned or consumers in general.

When MITI approves various export agreements or issues restriction orders, it is required to consult with or notify the Fair Trade Commission, and the Commission may request the Ministry to cancel or modify such agreements when it deems such action is necessary.

"Mixed" export cartels (agreements concerning domestic transactions of exporters) require an express case-by-case authorization by MITI as provided by section 5-2 of the Export and Import Trading Act. This type of cartel is subject to the same rules as "pure" export cartels but special exemption is provided where the domestic restraint or effect is ancillary to the restraint in export trade.

Should any difficulty arise in the execution of cartel policies and practices under the original agreements, provisions within Part VI of the Export and Import Trading Act provide the Minister of MITI with the power to issue orders:

> ... concerning exports and imports aimed at restricting the business activities of all persons engaged in the business concerned, if he finds that even with agreements on imports and exports there still exists an obstacle to the establishment of order in such trade.[50]

In explaining his government's support of Export Cartels, Mr. Takahashi, chairman of the Fair Trade Commission, stated in a 1973 speech that:

> For Japan, the country which depends on imports for most of its important resources, a moderate increase in exports is an essential factor for stable economic

> growth. However, up to now, corresponding to the very rapid development of the Japanese economy, its exports were forced to grow at a fast pace. We cannot deny the fact that this unusually fast export growth had had not a little effect on our trading partners. To avert these unfavourable results and to promote our exports with stability while maintaining orderly marketing, it is sometimes unavoidable to approve an export cartel formed under the support of the government.[51]

Such exemptions, however, only apply to national export cartels. International export cartels are considered to fall under the prohibition of international agreements as provided in section 6 of the Antimonopoly Act and Japan follows a strict policy to eliminate these cartels where they become know. In 1973, for the first time, Japan dissolved an international manmade fibre cartel for violation of section 6(1).[52]

Mergers

Merger activity in Japan is presently enforced under the provisions of section 15 and 16 of the Antimonopoly Act. In this context section 15(1) provides that:

> No company in Japan shall effect a merger or consolidation in either of the following cases:
>
> i) Where the effect of a merger may be to substantially restrain competition in any particular field of trade;
>
> ii) Where unfair business practices have been employed in the course of the merger or consolidation.

Section 15(2) goes on to state that prior notification is required for a proposed merger and that the companies involved cannot merge until 30 days (with option to extend to 60 days) have elapsed since filing (section 15(3)). During this period if the Fair Trade Commission thinks there is a violation, it issues a complaint or a recommendation.

Section 16 pertains to restrictions on the acquisitions of businesses and applies section 15 to the following cases:

i) Acquiring the whole or substantial part of the business in Japan of another company;

ii) Acquiring the whole or a substantial part of the fixed assets used for the business in Japan of another company;

iii) Taking on lease of the whole or a substantial part of the business in Japan of another company;

iv) Undertaking the management of the whole or a substantial part of the business in Japan of another company;

v) Entering into a contract which provides for a joint profit and loss account for business in Japan with another company.

In 1949, sections 15 and 16 of the original Antimonopoly Act were amended from a post to a prior notification system for mergers. The prevailing view was that the post-regulation system of merger was not desirable because it would place the company formed by merger in legal insecurity.[53] This view was maintained at the time of the 1953 amendments and is held today. Amendments to articles 15 and 16 in 1953 provided that mergers or transfers of business would be

restricted only when they substantially restrict competition, or when unfair business practices are employed.

The general criteria applied by the Fair Trade Commission in making a judgment on a proposed merger has been:

> As a general guideline a 30 per cent market share of a company after merger is considered a dangerous concentration. If it comes to 50 per cent, the possibility of the merger projects passing the Fair Trade Commission's screening is very remote.[54]

Additional criteria, suggested by MITI in 1966, have been adopted by the Fair Trade Commission:

i) Comparison of economic power with competitors;

ii) Business conditions of enterprises in related industries;

iii) Conditions of new entry (including entry of foreign enterprises);

iv) Competitive relation with substitutes;

v) Competitive relation with imported goods.[55]

There has been only one merger case attacked under section 15, Yawata Iron and Steel Co. and Fuji Iron and Steel Co. Ltd.[56] In 1968 the companies requested a Fair Trade Commission opinion on the potential applicability of the Antimonopoly Act. The proposal created an opportunity to obtain from the Fair Trade Commission an interpretation of section 15 of the Act.

The case involved two of Japan's largest steel companies, jointly producing 44.5 per cent of the pig iron production and 34.4 per cent of the crude steel production. The Commission saw certain aspects of the merger which appeared contrary to them. It was concerned with fields of trade in the industry which would become restrained due to the merger.

Realizing the potential restraints the Commission did not prohibit this merger but authorized it under certain conditions. It ordered the companies to transfer certain equipment and securities to rivals, to supply rivals with certain products on reasonable terms, and to provide rivals with certain technical assistance.[57] It was felt by the Commission that these measures would eliminate the dominant position. In giving its legal interpretation of section 15 the Commission stated in its decision:

> The case wherein the effect of the merger concerned may be to substantially restrain competition in a particular field of trade means the case wherein the market structure would change to be non-competitive as compared with that before the merger, by the effectuation of the merger concerned, and resultantly a specific enterpriser may attain the controlling position in the market. If an enterpriser has come to monopolize a market or has come to acquire the power to exert influence to some extent, freely by his own will, upon price, quality, quantity and various other conditions of transaction, by which his competitors

> would become unable to carry on their business activities independently he shall be regarded as one attaining the controlling position in the market.[58]

Opponents of the proposed Yawata-Fuji merger expressed the view that in the determination of illegality of a merger, consolidated power of the merging companies should be taken into consideration and that it is not proper to judge only whether substantial restraint of competition in an individual item of product results.[59] However, the Antimonopoly Act as presently enforced does not place entrepreneurs under control solely because their capital is great or because their activities extend to diversified fields. Therefore, the consolidated power of enterprise does not necessarily have to be considered in the regulation of the merger.

The significance and prevailing opinion of Antimonopoly supporters concerning the Fair Trade Commission's decision to give conditional approval to the Yawata-Fuji merger has been summed up in the following comment:

> It made fundamental breach in the containing barriers of the Antimonopoly Act. It would now be very difficult for the Fair Trade Commission to refuse an application for any merger at all.[60]

Interlocking Directorates

During the Zaibatsu period, the right to appoint directors of subsidiaries and interlocking directorates were important devices used by the holding company to control its subsidiaries. Japan's current legislation prohibits holding companies but interlocking directorates still exist in a more modified version as contained in section 13 of the Act:

(1) Neither an officer nor an employee (meaning in this section a person other than officers in the regular employment of a company) shall hold at the same time a position as an officer in another company or companies in Japan whenever the effect of such an interlocking directorate may be substantially to restrain competition in any particular field of trade.

(2) No company shall coerce another company or companies in Japan in competition with it in Japan, through unfair business practices, to admit one of its officers concurrently to the position of an officer or an employee of the latter company or companies, or to admit its employee, concurrently to the position of an officer of such company or companies.

Section 13(3) as in the case of many other provisions contained in the Act provides for a notification system whereby the Commission can have some measure of observation regarding interlocking directorates.

Originally the Antimonopoly Law provided that no officer could become an officer in a competing company; that an officer could not become an officer in a company where more than one fourth or more of the officers of such a company were already officers of a third company, and that no person could be an officer of four or more companies.[61] All of this was changed in the 1949 amendments when personnel interlocks were modified along the same lines as intercorporate stockholding, that is, that they were legal if obtained by fair means and if they did not tend substantially to lessen competition, which is the form in which the provision stands today.

Current enforcement of the law against private monopolization by the Fair Trade Commission finds in almost every case interlocking directorates being combined with intercorporate stockholding for the control and operation of a subsidiary. Such a case was reported to the OECD by Japan in 1973 whereby a company (hereinafter referred to as "the railway company") engaged in passenger transport by train and bus in Hiroshima City and its suburbs, held the greater part of the shares and directorships in the other company (hereinafter referred to as "the bus company") engaged in passenger transport by bus in the same region.[62] Almost all the passenger transport services by train and bus in the region was performed by these two companies.

Based on these facts, the Fair Trade Commission decided that the shares held by the railway company in the bus company were in violation of section 10(1) of the Antimonopoly Act (Restriction on Stockholding by a company) and that the interlocking directorates were in violation of section 13(1) of the Act (Restriction on interlocking directorates). The FTC therefore ordered:

(a) that the railway company should dispose of a certain number of its shares in the bus company;

(b) that persons holding directorships in both companies should resign their posts in the bus company;

(c) that the respondents should report to the FTC on measures taken under the preceding two paragraphs.[63]

Price Discrimination

In Japan, price discrimination by territory or by customers is prohibited as an unfair business practice unless a good cause can be shown. The relevant provision in the Act is section 19 which reads: "No entrepreneur shall employ unfair business practices." Section 2(7) paragraph (1) then provides for a definition of "unfair business practices" as it applies to price discrimination:

> (7) The term "unfair business practices" as used in this Act shall mean any coming under any one of the following paragraphs which tends to impede fair competition and which is designated by the Fair Trade Commission
>
> i) unduly discriminating against other entrepreneurs;

In an attempt to clarify its enforcement procedures under sections 19 and 2(7) of the Act, the Fair Trade Commission released its notification No. 11 of 1953 which designated 12 types of unfair business practices which applied to the entire industries. In particular, item 4 intends to restrict discriminatory prices by territory and by customers or by suppliers in selling and purchasing activities by designating an unfair business practice as the:

> Supplying or receiving, without good cause, commodities, funds, or other kinds of economic benefit at prices which discriminate between customers in different places or between customers.[64]

In the temporary injunction case of the Hokkoku Newspaper in 1957, the Tokyo High Court ruled that practices of discriminatory price by territory was unlawful.[65] Other cases involving leading decisions by the Courts and the FTC under section

19 of the Act focus attention on such restrictive business practices as refusal to sell and exclusive dealing.

Systematic Delivered Pricing

The Japanese Antimonopoly Legislation contains no provision for delivered pricing as a separate practice. However, when recognized as a form of price discrimination, such activity could fall under the provisions of section 19 discussed above. There appear to be no cases involving such practices.

Specialization Agreements

Although the Antimonopoly Act does not contain any provisions directly relating to specialization agreements, such agreements would be covered under the scope of section 3 if they constituted "unreasonable restraint of trade". Section 2(6) of the Act defines this latter term as:

> Such business activities, by which entrepreneurs by contract, agreement, or any other concerted activities mutually restrict or conduct their business activities in such a manner as to fix, maintain, or enhance prices; or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest a substantial restraint of competition in any particular field of trade.

In one detailed analysis of the Japanese Antimonopoly Act, "to limit products" as contained in section 2(6) is defined: "To limit products means limiting types or kinds of products and usually takes the form of standardization cartels and specialization cartels."[66] However, these cartels can be exempted upon request from the application of the prohibition in accordance with the provision of section 24-4[67] of the Act which permits the formation of rationalization cartels. Neverthelss, in the case of a specialization cartel, the restriction should not be "so as to concentrate production of a particular kind of product in any one entrepreneur" (section 24-4(3)(v)).[68]

III. SPECIFIC PRACTICES

Footnotes

12. See Hiroshi Iyori, _op.cit._, note 2, p.45.

13. See section 2(5) of the Antimonopoly Act.

14. See Organization for Economic Cooperation and Development, _Market Power and the Law_, (Paris, 1970), p. 146.

15. See Hiroshi Iyori, _op. cit_., note 2, p.47.

16. See Eleanor Hadley, _Antitrust in Japan_ (Princeton University Press, 1970), p. 291.

17. _Ibid_., p. 212.

18. _Ibid._, p. 253.

19. See Fair Trade Commission, "FTC Unveils Revealing Data on Nation's Leading Trading Firms", in _Antitrust Bulletin_ (spring 1975), pp. 171-186.

20. _Ibid_., p. 171.

21. _Ibid._, p. 186.

22. As reported in _Financial Times_, May 5, 1975 in article titled, "Antimonopoly Law Controversy."

23. See OECD, _op. cit_., note 3, sec. 2.2, p. 2 and for a brief discussion of conditions under which these specific industries are exempt from the Antimonopoly Act see Hiroshi Iyori, _op. cit_., note 2, pp. 120-122.

24. See Eleanor Hadley, _op. cit_., note 16, chp. 16, p. 390.

25. Those considered in need of a boost in the face of trade liberalization - automobiles, tires, special steels, ferro alloys and petrochemicals.

26. See Eugen J. Kaplan, Japan: The Government-Business Relationship (Bureau of International Commerce, U.S. Department of Commerce, U.S. Government Printing Office, Washington, D.C. February 1972), p. 32.

27. See Eleanor Hadley, op. cit., note 16, p. 391.

28. See J.C. Lobb, "Japan Inc. - the Total Conglomerate" in Columbia Journal of World Business (March-April 1971).

29. See Ryutaro Komiya, "Economic Planning in Japan", in Challenge (May-June 1975), pp. 9-20.

30. Contained in a briefing paper prepared for the 1965 Tokyo meeting of Business International, an organization made up of corporations operating on a worldwise basis.

31. See Masahiro Tatemoto, "Economic Basis of Civil Liberty",in Japan Echo (Vol. 1 #2 Tokyo, Japan 1974), p. 121.

32. Ibid., p. 121.

33. Ibid., p. 122.

34. See Organization for Economic Cooperation and Development, Restrictive Business Practices Relating to Patents and Licenses, (Paris, 1973) p. 35.

35. See Kozo Yamamura, op. cit., note 6, p. 4277.

36. The <u>Foreign Investment Act</u>, promulgated in 1950, provided that any agreement of contract which involved remittance abroad had to be approved before execution by the Foreign Investment Council. FTC staff members were invited to join the reviewing committee thus enabling the correction of any potential violation to the Antimonopoly Act before the FTC formal scrutiny.

37. See Jashikatsu Sakamoto, "Licensing in Japan", in <u>International Licensing Agreements</u>, 2nd edition, edited by Pollzien and Langen (Bobbs-Merrill Co. Inc., New York, 1973), pp. 253-282.

38. See Michiko Ariga, "International Trade of Japan and the Antimonopoly Act", in <u>The Journal of International Law and Economics</u> (December 1973), p. 191.

39. See <u>Study on Japan</u> by the United Nations Conference on Trade and Development Secretariat, <u>Restrictive Business Practices: Studies on U.K. and Northern Ireland, the U.S. and Japan</u>, TD/B390, p. 106, paras. 75-77.

40. <u>Ibid</u>., p. 106, paras. 75-77.

41. For a complete discussion on these articles see Eleanor Hadley, op. cit., note 16, p. 370.

42. See <u>Economic Information File Japan</u>, 1974/1975 edition, (World Economic Information Services, Tokyo, Japan), p. 67. The service of this information is from the Fair Trade Commission's White paper on Monopoly.

43. <u>Ibid</u>., p. 67.

44. See E. Hadley, _op. cit._, note 16, p. 380.

45. _Ibid._, p. 380

46. _Ibid._, p. 372.

47. See Chitoski Yanaga, _op. cit._, note 8, p. 172.

48. See Eugene Rotwein, "Economic Concentration and Monopoly in Japan", in _Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate: Concentration Outside the U.S._ (90th Congress, 2nd Session, Part 7A), p. 4268.

49. For a complete Act see OECD, _op. cit._, note 3, Section 2.1, pp. 1-18.

50. See study by the UNCTAD secretariat, _op. cit._, note 39, p. 98, par. 34.

51. Toshihide Takahoski, speech made at the opening plenary session of the Tokyo Conference, September, 1973.

52. See Michiko Ariga, _op. cit._, note 38, p. 194.

53. See Y. Kanazawa, "Firm Behaviour and Policy on Mergers in Japan", in _International Conference on Monopolies, Mergers and Restrictive Practices_ (Dept. of Trade and Industry, London, England, 1970), p. 122.

54. See Study on Japan by the UNCTAD secretariat, _op. cit._, note 39, p. 94, par. 9.

55. See Y. Kanazawa, _op. cit._, note 53, p. 118.

56. See "Japanese Fair Trade Commission Decision on the Yawata-Fuji Steel Merger" in _Anti-Trust Bulletin_ (Winter 1970), pp. 803-827.

57. *Ibid*., p. 803.

58. *Ibid.*, p. 118.

59. See Y. Kanazawa, *op. cit*., note 53, p. 121.

60. See K. Bieda, *The Structure and Operation of the Japanese Economy*, (John Wiley and Sons Australasia Pty. Ltd., Sydney, Australia, 1970), p. 224.

61. See Eleanor Hadley, *op. cit*., note 16, p. 347.

62. See Organization for Economic Cooperation and Development, *Annual Reports on Competition Policy in OECD Member Countries*, (Paris, 1974), p. 48-49.

63. *Ibid*., p. 49.

64. See OECD, *op. cit*., note 3, sec. 1.0.0, p.1.

65. See Hiroshi Iyori, *op. cit*., note 2, p. 74.

66. *Ibid*., p. 53.

67. See Appendix B.

68. See Hiroshi Iyori, *op. cit*., note 2, p. 93

IV. MOST RECENT DEVELOPMENTS

Media reports from Japan indicate that the recent proposals (March 1975) for amendments to the Japanese Antimonopoly Act currently await formal discussion by the Diet. Controversy surrounds the current efforts to strengthen the Act and the government appears reluctant to enter into formal debate while current economic conditions prevail. The Bill has gone through the House of Representatives and was on the Diet agenda but was not dealt with when the session ended in July. The Diet is scheduled to resume in September although no specific time has been set aside for the proposed Antimonopoly amendments. In the circumstances, the Fair Trade Commission has announced plans to provide stricter enforcement of existing legislation.

APPENDIX A

ANTIMONOPOLY ACT GUIDELINES FOR INTERNATIONAL LICENSING AGREEMENTS

(As translated by the Staff Office of the Fair Trade Commission)

May 24, 1968
Fair Trade Commission

I. Among the restrictions which are liable to come under unfair business practices in international licensing agreements on patent rights or utility model rights (hereinafter referred to as patent rights, etc.) the following are the outstanding:

(1) To restrict the area to which the licensee may export the goods covered by patent rights, etc. (hereinafter referred to as patented goods).

However, cases coming under a, b, or c listed below are excluded.

a. In case the licensor has patent rights, etc. which have been registered in the area to which the licensee's export is restricted (hereinafter referred to as the restricted area);

b. In case the licensor is selling patented goods in the restricted area in his normal business;

c. In case the licensor has granted to a third party an exclusive license to sell in the restricted area.

(2) To restrict the licensee's export prices

or quantities of patented goods, or to make it obligatory for the licensee to export patented goods through the licensor or a person designated by the licensor.

However, such cases are excluded where the licensor grants license to export to the area coming under either of the preceding a, b, or c and the said restrictions or obligations imposed are of reasonable scope.

(3) To restrict the licensee from manufacturing, using or selling goods, or employing technology which is in competition with the licensed subject.

However, such cases are excluded where the licensor grants an exclusive license and imposes no restriction on goods already being manufactured, used or sold, or technology already being utilized by the licensee.

(4) To make it obligatory for the licensee to purchase raw materials, parts, etc. from the licensor or a person designated by the licensor.

(5) To make it obligatory for the licensee to sell patented goods through the licensor or a person designated by the licensor.

(6) To restrict the resale prices of patented goods in Japan.

(7) To make it obligatory for the licensee to inform the licensor of knowledge or experience newly obtained regarding the licensed technology, or to assign the right with respect to an improved or applied invention by the licensee to the licensor or to grant the licensor a license thereon.

However, such cases are excluded where the licensor bears similar obligations and the obligations of both parties are equally balanced in substance.

(8) To charge royalties on goods which do not utilize licensed technology.

(9) To restrict the quality of raw materials, parts, etc., or of patented goods.

However, such cases are excluded where such restrictions are necessary to maintain the credit-ability of the registered trademark or to insure the effectiveness of the licensed technology.

II. The aforementioned guidelines shall apply to international know-how licensing agreements.

III. In international licensing agreements on patent rights, etc., the following acts shall be regarded as the exercise of rights under the Patent Act or the Utility Model Act:

(1) To grant license to manufacture, use, sell, etc., separately;

(2) To grant license for a limited period within the life of patent rights, etc., or for a limited area within the whole area covered by patent rights, etc.;

(3) To restrict the manufacture of patented goods to a limited field of technology or to restrict the sale thereof to a limited field of sales;

(4) To restrict the use of patented processes to a limited field of technology;

(5) To restrict the amount of output or the amount of sales of patented goods or to restrict the frequency of the use of patented processes.

APPENDIX B

EXEMPTIONS FOR CARTELS UNDER PROVISIONS OF ANTIMONOPOLY ACT

Section 24-3

(Depression cartels)

(1) Where there exists an extreme disequilibrium of supply and demand for a particular commodity, resulting in circumstances falling under each of the following paragraphs, the provisions of this Act shall not apply to concerted activities of entrepreneurs (including an act of a trade association which causes its constituent members to undertake concerted activities; hereinafter the same) who produce the said commodity or a trade association consisting of such entrepreneurs (hereinafter referred to as "products") approved in accordance with either of the following two subsections: Provided that the foregoing shall not apply when entrepreneurs employ unfair business practices or when any entrepreneur is caused to employ such practices.

i) The price of the said commodity is below the average cost of production, and a considerable part of the entrepreneurs in the trade concerned may eventually be forced to discontinue production;

ii) It is difficult to overcome such circumstances as mentioned in the foregoing paragraph by the rationalization of individual enterprises.

(2) When circumstances provided for in the preceding subsection exist, those producers who desire to effect concerted activities relating to

restrictions on output or sales, or on facilities (excluding such as will impede the renovation or improvement of facilities), in order to overcome such circumstances, may obtain from the Fair Trade Commission prior approval of the said activities.

(3) When circumstances provided for in subsection (1) above exist and if restriction on output of the commodity in a particular trade is found extremely difficult for technological reasons, those producers who desire to effect concerted activities involving price-fixing may obtain from the Fair Trade Commission, in accordance with the Regulations of the Fair Trade Commission, prior approval of the said activities. The same shall apply to a price-fixing agreement entered into concurrently with an agreement provided for in the preceding subsection, when the concerted activities have been effected upon approval under the preceding subsection, and such concerted activities alone proved to be entirely inadequate to overcome the circumstances provided for in subsection (1) above.

(4) The Fair Trade Commission shall not grant approval as provided for in the preceding two subsections unless the concerted activities approval as requested fall under the conditions provided for in the preceding two subsections and conform with each of the following requirements:

i) That they do not exceed the action necessary to overcome the circumstances provided for in subsection (1) above;

ii) That there is no fear of unduly injuring the interests of the consumers in general, and of related entrepreneurs;

iii) That they are not unjustly discriminatory;

iv) That they do not restrict unreasonably participation in or withdrawal from such activities.

(5) When the Fair Trade Commission has approved or dismissed an application for approval under subsection (2) or (3) above, or has taken action pursuant to the provisions of section 66(1) with regard to approval under subsection (2) or (3) above, it shall without delay make public the fact showing the reason for the said action.

(6) The producers engaged in concerted activities after approval under subsection (2) or (3) above shall file, without delay, a report thereof with the Fair Trade Commission when they have discontinued the said activities.

(7) The Fair Trade Commission shall, where an objection to approval under subsection (2) or (3) above has been made, conduct a public hearing in accordance with the Regulations of the Fair Trade Commission.

(8) The Fair Trade Commission shall, prior to making such approval under subsection (2) or (3) above, or to rejecting an application therefore, consult the competent minister in charge of the trade concerned. The same shall apply when the Fair Trade Commission takes action provided for in section 66(1) with respect to such approval under subsection (2) or (3) above.

Section 24-4

(Rationalization cartels)

(1) The provisions of this Act shall not apply to concerted activities to producers approved in accordance with the following subsection, where they are found particularly necessary for effecting an advancement of technology, an improvement in the

quality of goods, a reduction in costs, an increase in efficiency and any other rationalization of enterprises.

(2) Producers desirous of undertaking concerted activities regarding restrictions on technology or kinds of product, utilization of facilities for storage of raw materials or products or for transportation thereof, or utilization or purchase of by-products, waste, or scrap in the case provided for by the preceding subsection, may obtain prior approval from the Fair Trade Commission in accordance with the Regulations of the Fair Trade Commission.

(3) The Fair Trade Commission shall not grant approval under the preceding subsection unless concerted activities applied for fall under the conditions provided for in the preceding subsection, and conform with each of the following requirements:

i) That there is no fear of injuring the interests of customers;

ii) That there is no fear of unduly injuring the interests of consumers in general and of related entrepreneurs (excluding customers);

iii) That they are not unjustly discriminatory;

iv) That they do not restrict unreasonably the participation in or withdrawal from such activities;

v) That where restrictions on kinds of product are imposed differently on participants in the concerted activities, such differentiation is not designed to unduly concentrate production of a particular kind of

product in the hands of any one entrepreneur.

(4) The provisions of the proviso to subsection (1) and of subsections (5) to (8) of the preceding section shall apply mutatis mutandis to the concerted activities as provided for in subsection (2).

BIBLIOGRAPHY

Ariga, Michiko, "Merger Regulation in Japan", _Texas International Law Forum_ (Spring, 1969), pp. 112-126

"International Trade of Japan and the Antimonopoly Act", _The Journal of Internation Law and Economics_ (December, 1973), pp. 185-201.

Bieda, K. _The Structure and Operation of the Japanese Economy_ (John Wiley and Sons Australasia Pty Ltd., Sydney, Australia, 1970) pp. 185-242.

Edwards, Corwin, _Trade Regulations Overseas: The National Laws_ (Oceana Publications, Inc., New York, 1966), pp. 647-726.

Edwards, Corwin, _Control of Cartels and Monopolies: an International Comparison_ (Oceana Publications Inc., New York, 1967).

Fair Trade Commission, (Japan) "FTC Unveils Revealing Data on Nations's Leading Trading Firms", _Antitrust Bulletin_ (Spring, 1975), pp. 171-186.

"Decision on the Yawata-Fuji Steel Merger", _Antitrust Bulletin_ (Winter, 1970) pp. 803-827.

Hadley, Eleanor M., _Antitrust in Japan_ (Princeton University Press, 1970).

"Trust Busting in Japan", Harvard Business Review (July, 1948) pp. 425-440.

Iyori, Hiroshi, Antimonopoly Legislation in Japan (Federal Legal Publications, New York, N.Y., 1969).

Kanazawa, Y. "Firm Behavior and Policy on Mergers in Japan", International Conference on Monopolies, Mergers, and Restrictive Practices (Dept. of Trade and Industry, edited by J.B. Heath, London, England, 1970).

"The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power", Law in Japan (edited by Von Mehren, Harvard University Press, Massachusetts 1963) pp. 480-506.

Kaplan, Eugene, Japan: The Government-Business Relationship (U.S. Dept. of Commerce, U.S. Government Printing Office, Washington, D.C., 1972)

Komiya, Ryutaro, "Economic Planning in Japan", Challenge (May/June, 1975) pp. 9-20.

O.E.C.D. Committee of Experts on Restrictive Business Practices Annual Reports on Competition Policy in OECD Member Countries (Paris, 1973).

Annual Reports on Competition Policy in OECD Member Countries (Paris, 1974).

Restrictive Business Practices Relating to Patents and Licenses (Paris, 1972).

The Industrial Policy of Japan (Paris, 1972).

Export Cartels (Paris, 1974).

Comparative Summary of Legislations on Restrictive Business Practices (Paris, 1971).

Market Power and the Law (Paris, 1970).

Mergers and Competition Policy (Paris, 1974).

O.E.C.D., Guide to Legislation on Restrictive Business Practices (Paris, 1971) Vol. 111 Japan.

Rotwein, Eugene, "Economic Concentration and Monopoly in Japan", Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate: Concentration Outside the U.S. (90th Congress, 2nd session, Part 7A) pp. 4257-4268.

Sakamoto, Yoshikatsu, "Licensing in Japan", Internationa Licensing Agreements (edited by Pollzien and Langen, Bobbs-Merrill Co. Inc., New York, 1973).

Tatemoto, Masahiro, "Economic Basis of Civil Liberty", Japan Echo (Vol. 1, No. 2, 1974), pp. 112-122.

UNCTAD secretariat, Restrictive Business Practices: Studies on the United Kingdom of Great Britain and Northern Ireland, the United States of America and Japan (United Nations, New York, 1973-TD/B/390), pp. 93-108

World Economic Information Services, Economic Information File Japan (1974/1975 Edition, Tokyo, Japan), pp. 66-67

Yamamura, Kozo, "The Development of Antimonopoly Policy in Japan: The Erosion of Japanese Antimonopoly Policy, 1947-67", Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate: Concentration Outside the U.S. (90th Congress, 2nd Session, Part 7A) pp. 4273-4287.

Yanaga, Chitoshi, Big Business in Japanese Politics (Yale University Press, London, 1968), pp. 152-176.

SWEDEN

COMPETITION POLICY AND PRACTICES

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I. INTRODUCTION

This paper examines Swedish antitrust policy in those areas now under consideration for Stage Two of the amendments to the Canadian Combines Investigation Act. These specific topics are: mergers; monopolization; price discrimination; specialization agreements; export agreements; interlocking directorates, and systematic delivered pricing. The basic prohibitions under the Swedish law and the underlying philosophy of their antitrust enforcement is also briefly examined.

The paper is organized into three sections. Chapter II discusses the legislation and institutions from 1953 to 1971;[1] the treatment of the specific practices is analyzed in Chapter III, and finally, Chapter IV contains some general comments about the philosophy and overall effectiveness of antitrust enforcement in Sweden.

I. INTRODUCTION

Footnotes

1. For a comprehensive treatment of competition policy in Sweden, see James P. Cairns, The Regulation of Restrictive Practices: Recent European Experience. A background study to the Interim Report on Competition Policy (Ottawa: Economic Council of Canada, 1971). Professor Cairns' study does not discuss the recent amendments to the Swedish Legislation that came into effect in January, 1971. See also Lars G. Sandberg, "Antitrust Policy in Sweden" (1969), 9 Antitrust Bulletin 535.

II. THE LEGISLATION AND INSTITUTIONS, 1953 - 1971

Until 1953, some legislation existed in Sweden which enabled the authorities to make investigations of monopolistic tendencies and cartel practices but the procedures were designed basically for *ad hoc* inquiries only. The first antitrust statute, the Act to Counteract Certain Acts in Restraint of Competition in Business in Certain Instances, became law in September 1953.[2] The 1953 legislation was amended in 1956 (effective January 1, 1957) and these amendments remained in force until 1971.

Under the 1956 Act, two types of restrictive business practices were illegal - resale price maintenance and bid-rigging.[3] Violations were punishable by fines and/or imprisonment. Except for these *per se* offences, the Act did not prohibit any specific restrictive practices; rather the law called for *negotiations* between the antitrust authorities and the parties concerned where a restraint of competition was found to entail harmful effects.

Article 5(2) of the legislation reads as follows:

> A restraint of competition shall be deemed to have a harmful effect if, contrary to the public interest, it unduly affects the formation of prices, restrains productivity in business or impedes, or prevents the trade of others.

If the harmful effects included excessively high "monopolistic pricing", the Government was empowered to set maximum prices for a period of up to one year. This provision, however, has never been applied.[4]

The Act applied equally to "private enterprises, co-operative enterprises and *to enterprises owned totally or partially, by the Swedish Government or by municipalities.*"[5] (Italics mine.) The Act did

not apply to agreements between employers and employees on wages and conditions of work. While services were basically covered under the general section concerning restraints with harmful effects, the prohibition against resale price maintenance did not apply to such services as insurance and transportation.[6] The territorial applicability of the legislation was limited to harmful effects that arose in Sweden. Negotiations on restraints on competition having effects outside Sweden could take place only with the permission of the Government and if required by treaties with foreign powers.

Two institutions for the enforcement of the antitrust law were created in 1953. They were: the Office of the Freedom of Commerce Commissioner, also known as the Antitrust Ombudsman, and the Freedom of Commerce Board. The Commissioner was given supervisory, investigatory and prosecution functions. He was empowered to investigate complaints or order specific inquiries of alleged restrictive practices. If the Commissioner was led to believe that certain practices had harmful effects, he would attempt to negotiate with the enterprises concerned for the elimination of the practices. If the Commissioner was unsuccessful in his efforts, he instituted proceedings before the Freedom of Commerce Board.

The Freedom of Commerce Board was composed of nine members, including representatives of private enterprise, consumers and employees. The Chairman and Vice-Chairman were required to have legal training. The Board held hearings to consider the Commissioner's allegations. If the Board found that harmful effects did exist, they would order that compulsory negotiations take place. There was no appeal from the Board's decision. In the event that negotiations failed, the Board was required to report the matter to the Government.

A third antitrust institution, the National Price and Cartel Office, was created in 1956, replacing a war-time price control board and an investigatory bureau of the Board of Trade. The Office was to administer the Act Concerning the Obligation to Submit Information as to Conditions of Price and Competition. This legislation required that information on all restrictive agreements be registered in the Cartel Register at the request of the Government. Restrictive agreements in the banking, securities and insurance industries were registered elsewhere. The Cartel Office was also to supervise price tendencies in the Swedish economy, to provide information to the public and to conduct investigations of restrictive practices at the request of the Freedom of Commerce Commissioner.

The law in Sweden remained unchanged until 1966. In 1965, the Freedom of Commerce Board made formal notification to the King-in-Council that negotiations in a refusal-to-deal case had been unsuccessful. As a result of this, in 1966, the Freedom of Commerce Board was given new powers in cases of refusal-to-deal. The amendment empowered the Board to order suppliers to sell goods to certain buyers, on pain of a fine, where negotiations had been unsuccessful in eliminating the restraints on competition.

In 1970, the Market Court Act was passed which replaced the Freedom of Commerce Board with a new institution, the Market Court, effective January 1, 1971. The Court was empowered to deal with cases under the antitrust legislation and cases under new consumer protection legislation, the Marketing Practices Act and the Act Prohibiting Improper Terms of Contract.

The Market Court consists of a Chairman and a Vice-Chairman with legal training and eight other members. Two of these eight are special members, one for cases concerning restraints of competition

and one for consumer cases.[7]

The <u>Restraint of Competition Act</u> was also amended in 1970. The 1966 amendment is now incorporated in Article 21 of the legislation. Article 21 provides that:

> If negotiations have been concluded without it having been possible to eliminate the harmful effect of a restraint of competition and if the matter concerns the refusal of an entrepreneur to sell a commodity to an entrepreneur in a later stage of distribution on conditions which correspond to what he offers other entrepreneurs, the Market Court may order the entrepreneur in the earlier stage of distribution to effect such sale on pain of a fine.

There have been no legislative changes since the 1970 amendments. In October 1974, the Swedish Government appointed a Committee to review and revise the antitrust legislation. The Committee was requested to pay special attention to the problems of increasing concentration in Swedish industry.[8]

II. THE LEGISLATION AND INSTITUTIONS, 1953 - 1971

Footnotes

2. Cited hereafter as the Restraint of Competition Act. Some Swedish sources translate the title as the Restrictive Trade Practices Act or the Antitrust Act.

3. In some circumstances, entrepreneurs could be exempted from these proscriptions.

4. At least up to September 1974, according to Ulf Bernitz,"Swedish Antitrust Law" (mimeo forthcoming).

5. Ulf Bernitz, Swedish Anti-Trust and Resale Price Maintenance (Stockholm: The Industrial Council for Social and Economic Studies, 1964), p. 28.

6. The exclusion of services from the prohibition of resale price maintenance was based on a decision of the Freedom of Commerce Board. Another decision held that the sale of real estate was not covered by the provisions of the Act.

7. The Market Court Act also created the Office of Consumer Ombudsman, similar to the Antitrust Ombudsman.

8. Organization for Economic Co-operation and Development, Annual Report on Developments in Sweden, April 1974 - April 1975 (Paris: OECD Committee of Experts on Restrictive Business Practices, 1975), pp. 1-2. (Mimeographed.)

III. THE TREATMENT OF SPECIFIC PRACTICES

In Sweden, the restrictive practices examined in this paper fall, without exception, under Section 5 of the Restraint of Competition Act. Because none of these practices are *per se* illegal, it is necessary to adopt a case-by-case approach to examine the actions taken by Swedish authorities in specific instances.

Mergers

The economic and political climate has been favourable to mergers as a form of structural rationalization which has been supported by many interest groups.[9] With the prevailing attitude in favour of co-operation and consolidation in Swedish industry, it is only recently that the antitrust authorities have expressed concern about mergers and increasing concentration. The Special Committee appointed in 1974 was requested to examine the role of mergers in the Swedish economy.[10] The Antitrust Ombudsman also asked the National Price and Cartel Office to request market-dominating firms to provide information on their acquisitions.[11]

The Antitrust Ombudsman did not act against any merger in Swedish industry until 1973.

A cement monopoly was created in the fall of 1973 by the merger of Cementa which held 80 per cent of the Swedish market and Gullhogen, the only competitor. The Swedish State held 3.5 per cent and 14.6 per cent of the shares in the two companies respectively. The Antitrust Ombudsman requested the Market Court to enter into negotiations with Cementa because the merger had "wiped-out" competition in the cement industry (there was no foreign competition at this time). After negotiations between the firm and the Ministry of Industry, it was agreed that the Swedish State would purchase five per cent of the share capital of the merged firm. This agreement was approved by the Riksdag

in April 1974. The Antitrust Ombudsman concluded that the action of the Government precluded any finding that the merger was against the public interest.[12]

Monopolization

Although some concerns were expressed about the predominance of monopolies and cartels in Swedish industry in the 1930's, antitrust enforcement has not been extensively directed against dominant firms. The authorities recognized that in a small, free-trade country, some branches of industry must necessarily have an oligopolistic structure in order to exhaust the economies of scale. Foreign competition has been considered to be the best check on the abuse of monopoly power.

The Freedom of Commerce Board was specially prohibited from instituting negotiations aimed at the dissolution of large enterprises.[13] There is no such thing as "trust-busting" in Sweden. However, the practices of dominant firms are reviewable for harmful effects and the authorities have emphasized that particular attention would be paid to the dominant position in any cases involving such firms.[14]

In collecting information on dominant firms, the National Price and Cartel Office has adopted the following definitions:

> ... a monopoly exists when the largest firm produces at least 70 per cent of a specified commodity and imports of this commodity do not amount to more than 30 per cent of apparent consumption. Oligopoly exists when the four largest firms produce at least 70 per cent of a commodity or the eight largest produce 90 per cent, and the import share does not exceed 30 per cent.[15]

As noted above, the Swedish Government sanctioned the creation of a monopoly in the cement industry. The State purchased five per cent of the share capital in the merged firm and this public participation was deemed to preclude any finding that the creation of the monopoly was contrary to the public interest. Limitations on competition due to government regulation appear to be generally exempted from the antitrust laws; the agricultural sector is a prime example. Yet the *Restraint of Competition Act* is applicable to enterprises owned by the State as was noted above.[16] Therefore, it is difficult to determine what the policy would be regarding the abuse of monopoly power in regulated industries and there are no cases to provide any guidance.[17]

Intellectual Property

The general rules on registration in the Cartel Register apply to restrictive agreements involving patents and trademarks. Section 5 of the *Restraint of Competition Act* was held to apply to the abuse of patent privileges to promote restraints on competition distinct from the exclusive rights given by law.

In a recent case, the Antitrust Ombudsman requested the Market Court to open negotiations with the three largest producers of tire studs. The three Swedish firms and a German concern had entered into a patent licensing contract containing restrictive clauses concerning prices and quotas. The Court found that the Restraint of Competition Act applied to restraints of trade which originated in a legally founded right, i.e., in a patent.[18] The restrictive covenants on prices in the licensing contracts were found to fall outside the ambit of patent protection. Moreover, the quota provisions, while falling inside the scope of the exclusive right, were *a greater restraint on competition than*

could be warranted by the patent right. The Court felt that the restrictions would contribute to downward price rigidity in the market and would further restrict what little competition existed in the industry. Negotiations were ordered with a view to eliminating the restrictive practices.

In 1974, the Antitrust Ombudsman asked the National Price and Cartel Office to investigate the incidence of patent licensing agreements of a restrictive nature in the plastics, chemical, electronics, and agricultural machinery industries.[19]

Price Discrimination

Cases involving price discrimination have been few. In the Sunlight case in 1963, the Freedom of Commerce Board found that certain functional discounts granted by the soap company had harmful effects. Their decision, however, was based not only on the fact that the discounts discriminated against a particular method of distribution, but also on Sunlight's dominant position in the market.[20]

The most recent case concerning price discrimination that was brought to the Market Court was against Scandinavian Airlines which is partly owned by the Swedish Government.[21]

Other Selected Practices

With a generally favourable attitude toward structural rationalization on the part of government, industry and labour, it is not surprising that the Swedish authorities have not attacked specialization agreements. Swedish industry has admitted that the processes of rationalization, including specialization agreements, must entail some restrictions on competition and have expressed concern about what departures from the competitive ideal are allowable in the name of efficiency.[22] The National Price and Cartel Office can require

registration of specialization agreements but a review of the cases considered by the Freedom of Commerce Board and the Market Court (since 1971) does not show any instances where specialization agreements have been the subject of proceedings.

The law requiring negotiations to remove harmful effects does not apply to effects that arise outside Swedish territory unless permission is granted by the Government insofar as such enforcement is required by treaty with foreign powers. "Mixed" export cartels are required to register with the National Price and Cartel Office; therefore, presumably the harmful effects of such agreements on the domestic market could be subject to negotiation.[23]

The question of interlocking directorates was to be considered by a Committee established in 1961 to investigate patterns of ownership in Swedish industry.[24] Little further consideration seems to have been given to the matter until the early 1970's when the Swedish authorities began to express concern about concentration of private power in Swedish industry. The Committee established in the autumn of 1974 may report on this subject.

The antitrust authorities have not attacked any agreements concerning "systematic delivered pricing" or "basing-point pricing". Such agreements affecting transportation would be registerable with the Cartel Register if requested.

III. THE TREATMENT OF SPECIFIC PRACTICES

Footnotes

9. See the Industrial Council for Social and Economic Studies, Structural Rationalization: A Study by a Swedish Working Group (Stockholm: SNS, 1960), pp. 40-41. See also The Swedish Confederation of Trade Unions (LO), Economic Expansion and Structural Change, ed & trans. T.L. Johnston (London: George Allen & Unwin Ltd., 1963).

10. Bernitz suggests that "measures for merger control will probably be proposed by the new committee", op. cit., note 4, p. 22.

11. Since 1969, the National Price and Cartel Office has operated a "Big Business Register" to collect information on "concentration patterns, company acquisitions, mergers and related developments which involve dominant firms." SPK, Pris-Och Kartellfragor (Stockholm: Sårtryck UR 7, 1969), p. 15.

12. OECD, op. cit., note 8, pp. 3-4. See also "Investing, Licensing and Trading Conditions Abroad; Sweden, April 1974" (Business International Corp., 1974), p. 7 (Loose-leaf service).

13. J. Gillis Wetter, Swedish Antitrust Law (2d ed. rev.; Stockholm: Svenska Handelsbanken, 1963), p. 36. (Mimeographed). This is a privately printed edition of Wetter's original article which appeared under the same title in (1961), 10 American Journal of Comparative Law.

14. Ibid., p. 38.

15. SPK, _op. cit._, note 11.

16. Bernitz, _op. cit._, note 5.

17. The antitrust authorities did intervene in a _price discrimination_ case involving Scandinavian Airlines which is jointly owned by the Swedish, Danish and Norwegian Governments.

18. Organization for Economic Co-operation and Development, _Annual Reports on Developments in Sweden, April 1972 - April 1973_ (Paris: OECD Committee of Experts on Restrictive Business Practices, 1973), pp. 6-7. (Mimeographed).

19. OECD, _op. cit._, note 8, pp. 1-2.

20. Organization for Economic Co-operation and Development, _Guide to Legislation on Restrictive Business Practices, Vol. 111: Sweden_ (Paris: OECD, 1963), Case no. 17, pp.22-23.

21. Organization for Economic Co-operation and Development, _Annual Reports on Competition Policy and on Restrictive Business Practices Legislation and its Application April 1973 - April 1974: Sweden_ (Paris: OECD Committee on Experts on Restrictive Business Practices, 1974), pp. 54-55. (Mimeographed).

22. SNS, _op. cit._, note 9, p. 32.

23. Since 1973, an entrepreneur can be required to file any restrictive agreement that refers to conditions of pricing, production turnover or transportation _outside_ Sweden. OECD, _op. cit._, note 18, p. 1.

24. Wetter, _op. cit._, note 13, p. 37.

IV. THE OVERALL EFFECTIVENESS OF SWEDISH COMPETITION POLICY

Co-operation between the antitrust authorities and industry is the basic philosophy of Swedish competition policy. This philosophy is also demonstrated in their industrial policy and in labour relations. One commentator has noted that in Sweden the trade unions, employers' associations and similar organizations have co-operated with each other rather than acting as "pressure groups". "Compromise and co-operation rather than competition have been the vehicles of social change."[25]

The Government has relied almost solely on the principle of negotiation plus the sanction of adverse publicity to deal with restrictions on competition. It has been emphasized, however, that failure to co-operate with the antitrust authorities could lead the Government to introduce more stringent legislation.

The principles of co-operation and negotiation appear to have worked quite well in those cases that have been considered by the Swedish authorities. In only one case since 1953 has the Freedom of Commerce Board reported that negotiations had failed to achieve agreement. It is apparent, however, that the main targets of enforcement have been "retail trade in consumer goods, and cartel restrictions on new business or professional establishment."[26] This concentration on such limited areas has been of minor significance when compared to the economic benefits that could be derived from attacking more important sectors. The failure to attack structural deficiencies in major industries may be one of the reasons for the success of the negotiation system and the co-operative stance of Swedish industry and business.[27]

Questions of structural change received considerable attention in the 1960's but most of the concern was directed at the problem of rationalization of industry rather than competitive ideals.[28] The Swedish Confederation of Trade Unions addressed itself to this problem in its 1961 Manifesto. They noted with respect to the limits of competition:

> The decisive weakness of competition as a means of promoting structural change is, however, that economic policy can certainly remove obstacles to effective competition, but it can never force a businessman to compete against his will.[29] (emphasis mine)

This attitude towards competition, however, seems to be changing. In the 1970 election campaign, the Government announced a new economic policy, Näringspolitiken, defined basically as:

> ... a question of breaking up the private concentration of power in business and giving the consumer and the general public increased influence on the construction of business and industry.[30]

This new policy served as a framework for the Government's new measures for consumer protection introduced over the next two years. However, "... business interests started to talk about a 'crisis of confidence' - something relatively dramatic in the pragmatic and hitherto consensus-oriented Swedish society."[31]

This change in the Government's attitude, which is reflected in the establishment of the Committee in 1974 to "overhaul" Swedish competition policy, may signal the end of their system of antitrust enforcement based on co-operation and negotiation.[32]

IV. THE OVERALL EFFECTIVENESS OF SWEDISH COMPETITION POLICY

Footnotes

25. Eli F. Heckscher, An Economic History of Sweden, trans. Goran Ohlin (Cambridge, Mass.: Harvard University Press, 1954), p. 283.

26. See Wetter, op. cit., note 13, p. 64. In his 1961 article, Wetter attacked the system's emphasis on co-operation: "Swedish antitrust law is timid: it is largely built upon the assumption that private enterprise will voluntarily abide by decisions of the authorities [and] it rarely backs up the rules by sanctions."

27. Bernitz, op. cit., note 4, p. 22.

28. See Assar Lindbeck, Swedish Economic Policy (London: The MacMillan Press, 1975), pp. 219-27.

29. Op. cit., note 9, p. 49.

30. Håkan Berggren, "Consumer on Stage", Current Sweden, No. 17 (Stockholm: The Swedish Institute, Nov., 1973), p. 4.

31. Ibid.

32. Bernitz, op. cit., note 4, p. 22. Professor Bernitz's comment on the possible demise of the negotiation system is interesting when compared with Professor Cairns' conclusions of 1970: "There is no indication that Sweden will abandon the negotiations approach, based upon voluntary compliance, to restrictive business practices; it is a source of pride." Op. cit., note 1, p. 156.

UNITED KINGDOM
COMPETITION POLICY AND PRACTICES

by

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INTRODUCTION

The discussion of selected aspects of British "antitrust policy" - mergers, monopolization, specialization agreements, export agreements, price discrimination, basing point pricing - may usefully be preceded by a brief summary of past developments in the field.

1948 saw the passage of the Monopolies and Restrictive Practices (Inquiry and Control) Act; most control developments can be traced to the impact of this legislation. The Monopolies and Restrictive Practices Commission was established to assess, from the point of view of the public interest, monopoly situations referred to it by the Board of Trade. The Board, on the basis of the recommendations it received from the Commission, could take remedial action; the usual practice, however, was for the firms, or trade associations, to undertake to change their policies in an appropriate manner. Building on the findings and judgments of the Commission in individual cases, and in particular its general Report on Collective Discrimination, Parliament passed the Restrictive Trade Practices Act, in 1956. This Act established the critical presumption that agreements restrictive of competition were contrary to the public interest but provided an exemption possibility in the form of public benefit gateways. The Act resulted, within a few years, in the almost total dismantling of those restraints of trade which had been so widespread throughout the British economy. The Restrictive Practices Court found few of the arguments presented on behalf of restrictive agreements to be persuasive; in all but a few cases the presumption of public detriment was decisive; agreements were voluntarily abandoned as the futility of attempting a Court justification became increasingly evident.

In 1964, the Resale Prices Act was passed. It was based, as was the 1956 Act, on a public interest presumption - that resale price maintenance was contrary to the public interest - however, with exemption gateways available. Despite the gateways, the Act, repeating the experience of the 1956 Act, soon resulted in the virtual disappearance of resale price maintenance, as firms abandoned the practice rather than offer a defence.

Mergers were brought within governmental control in 1965, when the Monopolies and Mergers Act authorized the reference to the Monopolies Commission of mergers which met certain share-of-market or value-of-assets criteria. Mergers found contrary to the public interest by the Commission might be prohibited, or dissolved, by the Board of Trade. At the same time, for a period of several years, the Industrial Reorganization Corporation undertook the task of encouraging mergers, and promoting those increases in the size of firms it judged likely to increase efficiency through economies of scale and/or a transfer of assets to more competent management. The IRC was dissolved in 1971.

The 1956 Act was amended in 1968. Of importance was the addition of information agreements to the class of registrable agreements liable to a public interest assessment by the Court, thereby closing a loop-hole with which the earlier legislation had failed to deal. In addition, agreements deemed by the Board of Trade to be in the national interest could, in effect, be approved without the necessity of a favourable Court verdict.

The latest development in antitrust policy is the Fair Trading Act of 1973. The Act contained major provisions having to do with consumer protection; we are not concerned with those aspects of the legislation in this report. Agreements relating to services were brought within the class of agreements to which the 1956 procedure applied. The market share necessary to establish a monopoly (or

merger reference) situation was reduced from 33 per cent to 25 per cent. The practices of industries in public ownership were made eligible for a reference by the Secretary of State or Minister concerned.[1] The concept of public interest to be applied by the Monopolies Commission (now the Monopolies and Mergers Commission) was rewritten to place greater emphasis on competition. Most important, perhaps, the position of Director-General of Fair Trading was created, thereby establishing an official with considerable independence, and with a directed concern with competition, and consumer well-being. The Director-General was authorized by the Act to make monopoly references to the Commission independently of any Minister.[2]

Thus, from a very tentative start in 1948, the competition policy of the United Kingdom, in the relatively short time of 25 years, achieved a well-rounded status capable of dealing with restrictive agreements, resale price maintenance, the practices and policies of dominant firms, and the achievement of market power by means of merger. Surveying the scene, an American student of antitrust suggested in 1970 that "Perhaps, to put it delicately, the United States now has quite a bit to learn about antitrust policy techniques from Britain."[3]

INTRODUCTION

Footnotes

1. Certain labour practices may also be referred by the Secretary of State or other Minister to the Commission for a judgment, as to the effect of the practice on the public interest; this is another 1973 innovation.

2. "In my view the most important change is the creation of a new office, that of Director-General of Fair Trading ... The Director-General will be a most powerful officer. His actions are not the direct responsibility of any Minister ... He will be able to initiate monopoly references ... expected to be highly influental in advising on mergers references ... may also be instrumental in drawing up the terms of an order or undertaking if the Commission reports unfavourably." V. Korah. "The Fair Trading Act 1973 and the Functions of the Director-General", _Journal of Business Law_. 1973, pp. 305-311.

3. W.G. Shepherd, in W. Sichel (ed) _Antitrust Policy and Economic Welfare_ (University of Michigan, Ann Arbor 1970).

II. MERGERS POLICY

The United Kingdom's mergers control policy dates from 1965 when the Monopolies and Mergers Act was passed. Since 1948, power had existed to deal with the practices of firms, or groups of non-competing firms, occupying monopoly positions, as defined in the Monopolies and Restrictive Practices (Inquiry and Control) Act. There had been, however, no governmental power to prevent the growth, by merger, of firms already in monopoly positions or moving into such positions as a result of an acquisition. This deficiency was remedied by the 1965 Act, which involved a further strengthening of British "antitrust policy" beyond the 1956 Restrictive Trade Practices Act which had dealt effectively with the problem of restrictive agreements. In fact, the spate of mergers which prompted the 1965 Mergers Act was thought to be not unrelated to the very success of the 1956 legislation in eliminating all but a handful of agreements in restraint of trade, with, it was suggested, a consequent turning the attention of firms to the unchecked merger possibility.[4]

The 1965 legislation created a class of referrable mergers, based upon a share of market or absolute value of assets acquired criterion. These criteria will be considered more thoroughly later, as will other details of the Act. The President of the Board of Trade (in succeeding years other government departments were concerned as ministerial responsibilities shifted) could select, from the class of all referrable mergers, those few which he thought called for a public interest assessment; a provision was included to make it possible for a "stand-still" order to be issued to prevent the completion of a proposed merger, in the unlikely event that the parties concerned did not themselves choose to delay further action. In this selection task he was advised by a Mergers Panel which, given the inevitability that a very small proportion of

mergers potentially referrable would, in fact, be referred, occupied a key place in the whole mergers control process. Questions of the principles on which the Panel would make its recommendations were critical, as were the principles on which the President of the Board of Trade would decide which recommendations to accept. Although a 1969 publication listed the factors which would be taken into account in deciding upon a reference - factors as diverse as market structure, efficiency, balance of payments, regional policy and redundancy, with the emphasis related to the merger being horizontal, vertical, or conglomerate[5] - it was a continuing policy to consider each case on its own merits and to avoid any procedure that would result in the automatic referral of any merger that, for example, produced a certain market share, a proposal frequently advanced by critics.

Although, as just noted, no automatically working standards have been established - or, given the present philosophy, will be established - to determine which mergers will be referred, it is evident that certain factors will be assigned particular weight. To quote Sir Geoffrey Home when he was Minister for Trade and Consumer Affairs: "We look very closely at [horizontal] mergers which may significantly diminish competition... I do not think anyone would be surprised if we concluded that important mergers which significantly diminish competition call for a thorough investigation by the Monopolies Commission."[6] He also stated that "the likely impact of a merger on employment must constitute a very important element of our sifting process. If a merger seems likely to cause significant redundancies, or to be incompatible with the Government's regional policies, the case for full investigation [by the Commission] would be strengthened." He went on to say that "Our national priorities change. The Government's powers must be sufficiently flexible to reflect these changing priorities." (It is, accordingly, not surprising that the suggestion made in some quarters: that an

independent official (a Registrar of Monopolies, for example) should be given the authority to refer mergers to the Monopolies Commission was not adopted in the 1973 Act. The Director-General of Fair Trading was authorized to refer monopoly situations to the Commission; the power to refer mergers was retained by the Secretary of State, an indication of the political nature of the merger reference.) After rejecting the argument that certain mergers should be necessarily referred if they satisfied some market-share or size criterion, Sir Geoffrey concluded: "Decisions we have taken in particular cases - whether to refer or not... must be viewed in the context of the Government's policy priorities... I doubt whether the record would have been found more acceptable if the decisions had been taken on the basis of some arid arithmetical formula, rather than by human beings attempting to grapple with the unique features of every individual case." Any automatic referral requirement would deprive the government of its right to relate merger policy directly to its policy priorities, and it is for this reason - as well as others - that inflexible criteria have been judged unacceptable by successive governments.

The task of assessing the public interest implications of those mergers selected for reference by the Board of Trade was assigned to the Monopolies Commission, renamed the Monopolies and Mergers Commission in 1973. The Commission, it must be stressed, has only an advisory function. The following point of view is implicit: despite the data availability, theoretical, and value judgment problems, an outside body can reach conclusions concerning merger situations within a limited time period, which, when accepted by the government, will lead, generally, to an outcome from which the public will benefit. This Commission, which had been established by the 1948 Act, consisted primarily of part-time appointees deemed to possess the academic, business, public service, or other

qualifications and experience required to perform the Commission's difficult task. The nature of the Commission, its non-specialist members with their varieties of background, was likely, it could be argued, to interpret the public interest in a manner unlikely to be much out of line with prevailing opinion. This was of particular importance, because to all intents and purposes, the Commission was given a free hand to consider what constituted the public interest, and to determine what weights were to be given to the consequences (for good or bad) that were expected would flow from the merger under study. In its deliberations, the Commission was generally prepared to take into account assurances given by the acquiring firm concerning the way in which it would make use of its additional assets with, in some cases, these assurances assuming considerable importance in the final decision. Importance was also attached to the capacity of managements and their records of market behaviour in the prediction of how a merged concern would be run and increased power employed. Would the acquired company be managed as well by its new as it had been by its old management, assuming a management change? The President of the Board of Trade upon receiving the Commission's Report - a reasoned presentation of its judgment and made public - was authorized (but not obligated), if the Commission had found against the merger, to prohibit the acquisition or, if already effected, he could require divestiture. It is important to note that there is no power to stop a merger which the Commission does not consider to be against the public interest. An adverse report is, in other words, a necessary but not sufficient condition for the prohibition of a merger. It was possible, of course, for firms to abandon a merger proposal after the reference decision was made, or prior to an anticipated reference decision. Firms could also, following an adverse Commission report, voluntarily cancel their merger plans. In cases in which the Commission had found conditionally in favour of a merger, the acquiring firm might be

required to agree to behave in the way indicated by the Commission as necessary to minimize any public detriment flowing from the merger.[7]

The 1973 Fair Trading Act made only minor changes in the merger control portions of the United Kingdom's competition policy. The market share requirement to establish the possibility of a reference was lowered, from 33 per cent to 25 per cent, a change that applied to both monopoly and merger references. The public interest in terms of which mergers - and monopoly matters generally - were to be judged was rewritten, but with no certainty that this rewriting would, in fact, make much difference to the Commission's approach. The Act also made it possible to refer to the Monopolies and Mergers Commission some specific aspect of a merger for a public interest assessment and possible recommendation, the merger itself being accepted as not undesirable. In addition, the 1973 Act created the Office of Fair Trading and the Director-General of Fair Trading. The Director-General, as already noted, is an officer of considerable independence. The Fair Trading Act assigns to him general responsibilities relating to "practices which may adversely affect the economic interests of consumers in the United Kingdom", "circumstances relating to monopoly situations or uncompetitive practices"; he has, as well, the duty of keeping himself informed of all actual or potential mergers which come within the reference criteria. The Director-General serves as Chairman of the Mergers Panel, which advises the Secretary of State on merger references. Consequently, with the Panel now being located in the Office of Fair Trading, he will have a considerable input into the reference recommendations made to the Secretary of State for Prices and Consumer Protection. Moreover, the Director-General has been given the task of negotiating undertakings with the firms concerned following merger reports from the Commission which suggest such undertakings.

It has been reported by the Chairman of the Monopolies and Mergers Commission[8] that by the end of 1974 a total of 33 mergers had been referred, some three per cent of the mergers potentially referrable. Of these 18 were horizontal, two were vertical, 11 were conglomerate, and two of a mixed vertical and horizontal nature; conglomerate references were of particular importance in 1973 and 1974, when reference activity was especially vigorous.

In one third of the referred cases the merger project was abandoned. Twenty-one reports are stated to have been completed: 12 horizontal mergers (six against the public interest and six not), one vertical merger (not against the public interest), two mixed vertical and horizontal mergers (both against the public interest), and five conglomerate mergers (one against the public interest[9] and four not). Hence, in its first nine years of operation, the 1965 Act resulted in nine mergers being found contrary to the public interest and prohibited; several others were abandoned after reference; many were doubtless never proceeded with because of the expectation of a reference.

The merger provisions of the 1973 Fair Trading Act may now be summarized, at some risk of not drawing sufficient attention to fine points of detail or definition. The Act provides, in effect, that a merger reference may be made to the Commission by the Secretary of State where it appears to him that two or more enterprises have ceased to be distinct enterprises and that either the value of the assets taken over exceeds £5 million or at least one quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom, are supplied b (or to) one and the same person or are supplied by (or to) the persons by whom the relevant enterprises (so far as they continue to be carried on) are carried on.

This one quarter market share criterion is a change from the one third applicable in 1965 which was, in turn, based on the definition of monopoly in the 1948 Act. The reduction in the market share indicates the intention to set the merger and monopoly net a little wider than before. The assets criterion facilitates the control of vertical and conglomerate mergers. The supply of services, it should be observed, is also covered.

The meaning of "ceasing to be distinct enterprises" is defined in the Act as to be "brought under common ownership or control", and the meaning of "common control" is further elaborated.

With respect to the potentially vexing question of "goods or services of any description" in terms of which the market share standard is to be applied, the Act makes it clear that the Secretary of State or the Commission, as the case may be, can determine what is to constitute an acceptable classification of goods or services. Furthermore, under the Act it is up to the Secretary of State or the Commission to apply the one quarter criterion to a "value or cost or price or quantity or capacity or number of workers employed" measurement.

The Act provides that the Commission, in a merger reference, is to report on whether or not "a merger situation qualifying for investigation has been created and, if so, whether the creation of that situation operates, or may be expected to operate, against the public interest". Of particular importance is the phrase "against the public interest"; this produces an altogether different standard of judgment from the phrase "to the public benefit" and imposes upon the Commission a task different from that implicit in a wording which required positive benefits to be established.[10] When the Commission finds a merger to be detrimental to the public interest, the particular effects judged

harmful are to be specified, the actions appropriate to remedy or prevent these adverse effects are to be considered, and recommendations as to such action may be included in the report. The Secretary of State is authorized to prevent the merger, to break it up if it has already taken place, or to allow the merger to proceed subject to conditions. The decision taken by the Secretary of State following an adverse Commission report will have, as an important input, the advice of the Director-General of Fair Trading, giving his views as to whether or not, and, if so, in what form, the recommendations of the Commission should be accepted.

Mention must be made of the specific treatment accorded to newspaper mergers, treatment which indicates that governmental policy regards newspapers as something other than just a commercial product, calling for a much more thorough coverage and careful assessment of newspaper mergers than of mergers in general. This is reflected in two ways: (1) the prohibition of newspaper mergers of a certain size without the prior approval of the Secretary of State, based on a Monopolies Commission Report, (2) the use of different public interest criteria in a newspaper merger case.

The transfer of a newspaper to a newspaper proprietor shall, under the Act, be "unlawful and void" if the average circulation of the newspaper proprietor's newspapers plus the acquired newspaper exceeds 500,000 copies, unless consented to by the Secretary of State. Except, broadly speaking, in a situation whereby the newspaper to be acquired would otherwise cease to publish, or the acquired newspaper is extremely small, the Secretary of State shall not give his consent without a report from the Monopolies Commission. The Commission will determine whether or not the transfer may be expected to operate against the public interest "taking into account all matters which appear in the circumstances to be relevant and, in particular, the need for accurate presentation of news and free expression of

opinion". The Commission may indicate what conditions might be required to cause a merger not to operate against the public interest, and the Secretary of State, in consenting to such a merger, may impose these conditions. It then becomes a punishable offence to break the conditions laid down when consent was given. For purposes of newspaper references, the Monopolies and Mergers Commission is strengthened by the availability of additional members who, it may be assumed, are selected because of their special concern with the ability to assess mergers in the light of the "need for accurate presentation of news and free expression of opinion" as required by the Act.

The British approach to mergers policy is one where certain mergers are selected for a public interest assessment by an independent body, and where prohibition of a merger requires that it be found against the public interest by that body. The British experience illustrates a number of important issues which arise in connection with that approach: assessment criteria, selection criteria, burden of proof, and manageability given the inevitable time and resource constraints. In the substantial literature dealing with British mergers policy these are the major themes, the principal sources of controversy. A few comments may be made on each of these points.[11]

Assessment Criteria

The 1948 Act required that the Monopolies Commission interpret the concept of public interest in such a general way that, in effect, the Commission itself determined the nature of the public interest. Reference to the efficient and economical production, treatment and distribution of goods, technical improvements, progressive increase in efficiency, opening up of new markets and fullest use and best distribution of men, materials, and industrial capacity provided minimal guidelines.[12] In the 1965 Act no attempt was made to establish new public interest criteria, or to introduce more specific

guidelines. In the 1973 Fair Trading Act the Commission is told to "take into account all matters which appear to them in the particular circumstances to be relevant" (a phrase also used in the 1948 Act) to the public interest. Regard shall be had, however, to "the desirability

a) of maintaining and promoting effective competition...

b) of promoting the interests of consumers, purchasers and other users... in respect of prices... quality... variety...

c) of promoting, through competition, the reduction of costs...

d) of maintaining and promoting the balanced distribution of industry and employment

e) of maintaining and promoting competitive activity [in external] markets."

This new statement of the public interest concept may, through its reference to competition, have some impact on the Commission's thinking; this remains to be seen.[13] More important "all matters which appear to them to be relevant" may be considered by the Commission.

The position of the British Commission is strikingly different from that of the Federal Cartel Office in Germany where, in merger cases, only competitive consequences are to be considered. Given the variety of factors that may be considered relevant - the effect on employment, the implications for management, the effect on exports, the possibilities of economies of scale, the research and development expenditure expectations, the probable consequences for prices and profits of the changed market structure - the Commission finds itself with a truly formidable task of a policy nature. It is undertaking a comparison of costs

(expected) and benefits (expected) all from a public interest point of view. Reasonable men will differ with respect to the expected consequences, and with respect to the weight assigned by the Commission to these various costs and benefits. The policy issue centres around the appropriateness of a generalized public interest assessment of what is essentially a change in market structure, a change incidentally, likely to have long-run consequences more significant than the short-run implications concerned with the public interest may stress (e.g. the present state of the balance of payments or the present rate of unemployment in some particular region). The alternatives to a public interest assessment are, as noted in footnote 11, a decision based on purely competitive effects or a decision involving a competition loss - efficiency gain evaluation.

Selection Criteria

Although most of the discussion of mergers policy in the United Kingdom centres on the work of the Monopolies and Mergers Commission, largely because of the public distribution of its reports, with their debatable assessment of economic consequences and the public interest, it can be argued that it is the decision of the Secretary of State, as advised by his Mergers Panel, whether or not to refer that is vital. This follows from the fact that very few of the mergers eligible for reference get referred, a fact, incidentally, of fundamental significance in the assessment of any system which creates a class of referrable mergers greatly in excess of the number of mergers it is reasonable to refer, given the magnitude of the Commission's task, the limited resources that can be made available to the Commission and the inherent irrationality of referring more mergers than can be intelligently considered. In many cases, no doubt, no reasonable person would recommend (or oppose) a reference. In other cases, clearly, considerable doubt will attach to the desirability, from a public interest point of view, of a reference, especially

when it is recognized that a merger reference imposes considerable costs on the firms concerned and that the prospect of "defending" a merger case may deter a firm from proceeding with what might well have been an unobjectionable acquisition. The discretion that must be exercised is critical to the long-run development of industrial structures. The decision whether or not to refer is normally made within three weeks of government officials becoming aware of the merger proposal, so that much less time is available for an evaluation than applies to a reference considered by the Commission. It is in light of this type of problem that some students of the British system have proposed guidelines, usually of a market share or absolute size type, which, if met, would necessarily result in a reference. Such an automatic referral system is, however, not in agreement with the pragmatic case-by-case British philosophy and might, depending on the market share chosen, require the referral of more mergers than the Commission can responsibly handle. It is this sort of problem that Sir Geoffrey Howe was considering in his comments, previously noted.

Burden of Proof

The legislation is so worded that the Commission will recommend the prohibition of a merger only if it is against the public interest. A merger will, accordingly be "approved" even though the Commission expects no public benefits to flow from the merger - even if it is very skeptical as to the claims made on behalf of the merger as it has been on numerous occasions - if no detrimental consequences are established. And if the balance between benefits and detriments is judged even, the merger will not be condemned. It has been suggested that, for example, unless the parties to a proposed merger can convince the Commission that it will be a source of positive public benefit through greater efficiency, or by bringing assets under the control of a more enterprising and innovative management, the

merger will be disallowed (or recommended for prohibition to the Secretary of State). In certain situations, it is argued that the probability of public detriment is so strong - because the acquisition will result in an "excessively large" (however determined) market share - that those wishing to merge should be required to establish that specific public benefits will result. The philosophy of the Act is, however, that the decision to refer is a neutral matter so that no presumption as to public detriment is warranted. (It is also a matter for debate whether or not economic theory and the empirical study of the performance of firms in particular market structures justify the presumption of probable public detriment implicit in this "positive benefit" demonstration requirement.) It is true, of course, that mergers resulting in a very high market share have a greater probability of being referred to the Commission than mergers involving a relatively small increase in market share in excess of the minimum required for a referral possibility, but this falls far short of the case argued by those who believe that such high market-share mergers should be compelled to show a public benefit.

Time and Resource Constraints

Certain fundamental questions arise when the constraints within which a system such as that of the United Kingdom must work are considered. Within three weeks, as a rule, a decision has to be made whether to refer or not, and the data necessary to make a sensible decision have to be collected and analyzed. There must be some limit to the number of mergers that can be effectively handled in such a time period, especially in view of the many factors considered relevant to the desirability of a reference. In the case of a merger reference, the Monopolies and Mergers Commission must within six months, or, exceptionally, nine months render its public interest verdict.[14] It must arrive at its decision through a procedure that is seen by

the parties concerned to be fair, thorough, and responsible. It must assess the various benefits claimed by those proposing to merge or suggested by its own theoretical analysis; it must assess the various costs or detriments alleged by those opposing the merger or suggested by its own theoretical analysis; it must determine, in effect, what weights to assign to these various costs and benefits; it must, finally, arrive at a judgment as to whether or not the proposed merger is contrary to an essentially undefined public interest. That the task required of the Commission is demanding is obvious, that invalid arguments may be accepted or inappropriate weights assigned is clear.[15] Yet the decisions, when made and presented for public examination, must provide a continuing reason for acceptance of the Commission's capacity to tackle these complex issues.[16] The proposition that mergers should be prohibited if they are contrary to the public interest is eminently reasonable; to devise a structure, and to provide the resources, which will succeed in achieving the objectives of such a system are enormously more difficult than is the statement of the underlying proposition; the fact that the 1973 Fair Trading Act continued the 1965 legislation as it related to mergers, with only minor modifications, suggests that the United Kingdom is making a success of a demandingly difficult procedure, at least in the sense that none of the major changes proposed by critics of the 1965 Act were adopted.[17]

II. MERGERS POLICY

Footnotes

4. It is reported in P.E. Hart, M.A. Utton, and G. Walshe, Mergers and Concentration in British Industry (Cambridge University Press, 1973), that one of the authors (Utton) "has shown that between 1954 and 1965 nearly half of the increase in the degree of business concentration within manufacturing industry [in the United Kingdom] as a whole may be attributed to mergers." p. 157. Also D.G. Gribbin has written "There is also substantial evidence that many of these mergers were in direct response to the new situation created by the ending of cartels, and they were the means by which the competitive forces were brought under control." He is discussing the mergers that were significant in the post-war increase in concentration, especially since the 1950's. "Recent Antitrust Developments in the United Kingdom" Mimeo, p. 3.

5. The publication is Mergers - a Guide to Board of Trade Practice (HMSO, London, 1969). Martin Howe, after noting some of the questions the Board considers, comments that "It is a continuing feature of British monopoly policy to be confused by the introduction of other aspects of Government policy." "Rethinking British Merger Policy", The Antitrust Bulletin (Spring, 1972), p. 286. See also Brian Hindley. "The questions... refer to issues which are best handled by other means... and reflect a lack of ability to distinguish what considerations are important for merger policy. [These important considerations] are economies of scale and market power." Industrial Merger and Public Policy (Institute of Economic Affairs, 1970).

6. Sir Geoffrey Howe, Government Policy on Mergers, "Trade and Industry" November 1, 1973. With respect to the employment criterion, it is reported by George and Priscilla Polanyi, that "the reason given [for not referring a merger in the privately owned steel industry] was that employment prospects in the acquired company, and in particular at its plant in Glasgow, would be maintained after the merger." "The Fair Trading Bill and Monopoly Policy", The Three Banks Review (June 1973), p. 34.

7. The Secretary of State, it might be added, might have taken into account assurances offered by the acquiring firm in reaching a decision not to refer a certain merger. V. Korah has expressed concern as to the role of such assurances in mergers policy: "Most of these assurances are difficult to quantify. No doubt they are offered in good faith by managers who intend to keep on good terms with the Board of Trade. But circumstances change, particularly if the management is replaced... the lack of precision provides a good excuse for not complying with them if it becomes expensive to do so some years later. It is hoped that they have not greatly influenced the Board's decision not to refer the particular merger concerned." "Mergers and the Monopolies Commission", Journal of Business Law, 1969, p. 321. See also M. Beesley in J.M. Samuels, (ed) Readings in Mergers and Take-Overs, (Paul Elek Books, London, 1972). "Assurances should not be used... as an alternative to reference to the Commission. Analysis of their justification, relevance and practicability, should be dealt with by the Commission. Assurances should only be the outcome of a Commission cost-benefit analysis." p. 139. Alister Sutherland also considers "reliance on undertakings... a very doubtful safeguard of the public interest... The necessity to ask for undertakings about the

behaviour surely reveals that the merger would make the market insufficiently competitive." See his "The Management of Mergers Policy" in S. Caincross (ed) The Managed Economy", (Basil Blackwell, Oxford, 1970), p. 128.

8. Sir Ashton Roskill, "Merger Control in the United Kingdom", Mimeo, Seminar on Joint Ventures and Monopolizing, 10-12 April, 1975, Brussels.

9. In the conglomerate merger found to be against the public interest, the major issue was not any implications that the merger might have for competition. Instead it was the expectation that the merger would have adverse consequences on managerial efficiency that prompted the Commission to reach its decision. See V. Korah, "The Control of Conglomerate Mergers in the United Kingdom", Antitrust Bulletin (Winter 1970). "The Commission concluded that the Rank - De La Rue merger was not very likely to have an adverse effect on competition, but that, nevertheless, it might be expected to operate against the public interest because there was a serious risk that the efficiency and trading volume of De La Rue would be adversely affected... the loss of efficiency would adversely affect the public interest, including the balance of payments." (p. 764). The substantial number of conglomerate mergers referred to the Commission (11 of 33) is indicative of government concern with mergers quite apart from the effect on competition that is the usual foundation of mergers policy (and is, of course, not unimportant in the United Kingdom). From this point of view, it is perhaps misleading to treat mergers policy in the United Kingdom as a part of competition policy, as other than competitive effects can be decisive.

10. This point has been stressed by Alister Sutherland in his studies of mergers policy in the United Kingdom. In discussing one case (Great Britain, Monopolies Commission, British Insulated Callender's Cables Ltd and Pyrotenax Ltd., Report on Proposed Merger, London, HMSO, May 31, 1967) in which the merger was found not to be contrary to the public interest he writes "It would not be difficult to conclude that, if the 1965 Act had been based on a test in which it had to be shown that a merger would positively advance the public interest, then this merger would not have been passed by the Monopolies Commission." The Monopolies Commission in Action (Cambridge University Press, 1969), p. 63. He writes that the Monopolies Commission "gives the impression ... that it is taking refuge behind the form of words used in the [merger] reference.... whether the merger would be contrary to the public interest". (p. 53). He laments the failure of the British procedure to require the demonstration by the merging firms that public benefits will be produced. Various commentators have made the point that the need to demonstrate specific benefits would compel firms proposing to merge to give much more thought than they now do to the measures whereby efficiencies might be realized, and attempt to quantify these expected efficiency gains. The tendency for firms contemplating a merger to give rather little thought to these important questions has been noted by numerous students of merger activity. See M. Beesley, in G.C. Allen, et al, Mergers, Take-Overs and the Structure of Industry. (Institute of Economic Affairs, London, 1973) "An important feature of the increasing study of mergers of recent years... cannot fail to impress, in detail, with the apparent general lack of economic planning by parties contemplating

merger. With some notable exceptions, mergers are not, it seems, the result of well thought out corporate acquisition strategies. Few concrete plans are laid for the realization of putative economies, technological gains." (p. 77).

11. It may be pointed out that mergers policy can be classified into three types:

a) Only the competitive impact of the merger may be considered so that the merger is condemned if there is an "undue" reduction of competition;

b) an evaluation of the merger may be made confined to a comparison of detriments resulting from the reduction of competition and benefits resulting from increased efficiencies so that the merger is condemned if the harm flowing from the diminution of competition is greater (in whatever sense) than the gains from the greater efficiency made possible;

c) an assessment of the merger may be made from an extremely wide public interest point of view. This public interest approach can lead, logically, to a merger being condemned as against the public interest, even if it has no implications at all for competition, if, in the judgment of those responsible for the assessment it would reduce efficiency, or produce some undesirable consequence unrelated to competition.

12. One Commissioner, G.C. Allen, is quoted as follows: "The guidance given by the Act consisted of a storing of platitudes which the Commission found valueless, and it was left for the members themselves to reach their own conclusions by reference to the assumptions, principles or prejudices which their

training and experience caused them to apply to economic affairs." George Polanyi, Which Way Monopoly Policy, (Institute of Economic Affairs, London, 1973).

13. George and Priscilla Polanyi note that the "emphasis is now clearly on competition as the means for stimulating economic efficiency". They have doubts, however, as to whether or not this emphasis will be all that important. In particular, the directive to the Commission specifically to take account of local employment prospects - and to continue to consider all things deemed relevant - is seen as a compromise to prevent the favouring of competition being assigned an undue weight. Op. cit., note 6. And V. Korah, in "The Fair Trading Act 1973, and the Functions of the Director-General", op. cit., note 2, p. 310, writes that the new public interest definition "is unlikely to have a significant effect on the Commission's conclusions" as the Commission frequently considered the desirability of competition and the interests of consumers with the original definition.

14. Brian Hindley has commented on the "existing machinery [that] confronts the Monopolies Commission with the absurd task of quickly distilling, from unverifiable assertions of the interested parties, an ill-defined public interest." And he suggests that "if three or four monopolistically-inclined buyers arranged simultaneous offers the machinery would be swamped." Either each merger would be examined, but inadequately, or some of the mergers would not be sent to the Commission, despite their importance to the public interest. In G.C. Allen, et al., op. cit., note 10, p.26.

15. In the view of Michael Beesley "the Monopolies Commission experience has shown that an impossibly difficult task of cost-benefit

analysis is required for a case-by-case approach to merger control. It is inconceivable that case studies could assemble the relevant evidence... and interpret it in the time-scale required not to frustrate merger bids." In G.C. Allen, et. al, op. cit., note 10, p. 78. M.A. Crew and C.K. Rowley may also be quoted: "In terms of the evidence available... a national cost-benefit judgment on the [bank] merger clearly was impossible." But it is the working assumption of the United Kingdom procedure that, despite time and resource limitations, a rational judgment is possible. Crew and Rowley go on to suggest that "if this was the best that a relatively well-organized, well-staffed and experienced investigatory body could produce" then "there is good reason for calling into question the pragmatic approach of piecemeal investigation". "Antitrust Policy: Economics versus Management Science", Moorgate and Wall Street Review (Autumn 1970), p. 32.

16. G.C. Allen has expressed the matter as follows: "Whether any body of outside investigators can draw the distinction [between mergers which are expected to promote efficiency and those of which the main result appears to be the strengthening of monopoly] is more debatable. But they have to try... simply because some mergers introduce an unacceptable degree of monopoly into particular industries without any compensating advantages and there must be some independent body to advise on what should be done." G.C. Allen, et. al, op. cit., note 10, p. 9.

17. Concern that so little note was taken of suggestions for improvements in mergers policy has been expressed in a recent study of competition policy in the United Kingdom. "Control

of mergers is a major problem facing government today; yet the 1973 legislation continues with a process of dealing with mergers which has been shown to be by turns impotent and arbitrary." "The merger situation remains as unsatisfactory as ever ... A degree of discretion, political discretion; is involved which simply makes competition policy unworkable in the area of mergers. It would have been better had the law been changed in such a way that mergers which significantly reduced competition were declared illegal." D. Swann, D. O'Brien, W. Maunder, W. Howe, Competition in British Industry (London, George Allen & Unwin, 1974), pp. 221, 219.

III. MONOPOLIZATION

The Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, is the basis for the United Kingdom's policy on dominant firms and hence for its policy on monopolization. Prior to 1956, the Monopolies and Restrictive Practices Commission, established in 1948, dealt mainly with firms which, as a group, occupied a monopoly position based upon agreements restrictive of competition. Since that time such cartel-based monopolies have been the concern of the Registrar of Restrictive Trading Agreements (since 1973, the Director-General of Fair Trading) and the Restrictive Practices Court. Hence, the main concern of the Commission has been the conduct of dominant firms, perhaps in an oligopolistic situation (i.e., of firms occupying a monopoly position as defined). Mergers, as a type of monopolization, were brought under control in 1965 and need not be dealt with here.

Until 1973, monopoly cases were referred to the Monopolies Commission for a public interest assessment by the Board of Trade or appropriate Secretary of State, depending on the location of the reference authority. Monopoly situations may now be referred by the Director-General of Fair Trading, or, as before, the Secretary of State. As with mergers, the Commission reports to the Secretary of State with, on most references, its assessment of the referred situation from a public interest point of view, making recommendations, which are purely advisory, as to what should be done to remedy any detrimental aspects the Commission may find.

From the 1973 Fair Trading Act a few key sections may be noted.

Section 6 defines a monopoly situation as existing if "at least one quarter [a change from the

one third standard of 1948] of all the goods of that description which are supplied in the United Kingdom are supplied by one and the same person". Covered is the case in which one quarter of all the goods are supplied by more than one person who "so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description". Oligopolies may thus be brought within the confines of a defined monopoly situation and so become eligible for reference.[18]

Section 7 applies the monopoly position to service (a 1965 extension of the original 1948 coverage), and Section 9 states that the reference may be limited to a part of the United Kingdom. Prior to 1973, a "substantial part" of the United Kingdom was the requirement.

Sections 48 and 49 deal with references to the Commission. Section 48 relates to a "monopoly reference limited to the facts" and includes the requirement that the Commission investigate and report "whether any steps (by way of uncompetitive practices or otherwise) are being taken... for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way, and whether any action or omission... is attributable to the existence of the monopoly situation and, if so, what action or omission and in what way is so attributable." The phrase "for the purpose of exploiting or maintaining the monopoly situation" replaces the 1948 language "as a result of or for the purpose of preserving, those conditions".

Section 49 moves beyond Section 48 when, in addition to the matters already noted, the Commission is to report "on the question whether any facts found by the Commission in pursuance of their investigations... operate, or may be expecte

to operate, against the public interest". And Section 49 goes on to list certain particular things to which the Commission may be asked to direct its attention: prices charged, price recommendations, refusals to supply, price or other discrimination; the Commission will then focus on the indicated practice.

The public interest concept to be applied by the Commission has been considered in the discussion of mergers policy. It may again be noted that, from 1948 to 1973, the public interest was, in effect, left to be determined by the Commission. The 1973 Act, by including a specific reference to the desirability of competition, may result in a somewhat changed approach to the public interest, but there is reason to believe that the substantive effect of the change will be minimal.

Section 54 calls for the Commission, when they find the public interest likely to be adversely affected, to "specify the particular effects adverse to the public interest" and to "consider what action (if any) should be taken for the purpose of remedying or preventing those adverse effects and may, if they think fit, include in their report recommendations as to such action". The "appropriate Minister" is then authorized, by Section 56, to exercise by "order made by statutory instrument" those assigned powers he considers requisite to remedy or prevent the adverse effects. The assigned powers include declaring unlawful (for the particular firms concerned) a number of practices including tied sales, discrimination, preferential considerations, and price discrimination; moreover the appropriate Minister may specify what prices may be charged.

In sum, the 1973 legislation, and the 1948 and other preceding Acts, create a considerable power for the government, on the basis of a Monopolies Commission finding that certain practices

or effects are contrary to the public interest, to regulate the conduct of firms, or groups of firms, in a monopoly position and acting in a manner deemed harmful to the public. It should be stressed that, in nearly all cases, an adverse report by the Commission is followed, not by an Order, but by consultations and negotiations whereby the firms undertake to behave in a manner judged by the Secretary of State sufficient to remedy the effects condemned by the Commission.

A listing of some of the practices which have been regulated following an adverse report by the Monopolies Commission should give some indication of the range of matters that may come under the Commission's scrutiny and result in a recommendation, and hence some indication of the extent to which the freedom of a dominant firm to conduct its affairs as it sees fit may be limited. What follows is intended to be illustrative only.

In chemical fertilizers,[19] assurances were given not to seek unreasonable profits on monopoly materials. In wallpaper,[20] undertakings concerning further acquisitions, exclusive dealing and resale price maintenance were given. In petrol supply,[21] the principal suppliers gave undertakings dealing with the time period for solus agreements, full-line forcing and further acquisitions. In colour film,[22] undertakings relating to a reduction in the price of films and processing charges, retailers' discounts, exclusive dealing, and tie-in sales were obtained. In household detergents,[23] an undertaking was accepted whereby an alternative range of soap powders and detergents would be marketed at a price 20 per cent below those of existing lines. In this industry, the Commission had found the advertising, promotion and price policies of the two leading firms to be contrary to the public interest, and, in addition to recommending a price reduction, had recommended a substantial (40 per cent) reduction in selling expenses. In films for exhibition,[24] a number of

Commission recommendations relating to flexible booking, allocation dispute machinery, tied-in hiring of films, and other practices led to undertakings to implement the recommendations. In infant milk foods,[25] undertakings affecting distribution to retail shops were agreed to. In cellulosic fibres,[26] it was agreed to cease preferential prices to certain customers. In clutch mechanisms,[27] undertakings applying to pricing policy and profits, recommended prices and discounts, and restrictions on wholesalers were accepted. In breakfast cereals,[28] future price increases by one of the firms were to require government approval.

In addition to suggesting how extensive is the control potential in the United Kingdom's procedure for dealing with dominant firms, the above discussion is indicative of the importance of undertakings agreed to by firms (rather than orders being imposed) in the control process. Problems in the policing of assurances, given the difficulty of quantification, arise. The need to reconsider the appropriateness of original undertakings in a changed economic environment, and the possible release of a firm from undertakings which are no longer necessary, may also be mentioned.

The following observation by Joliet on the United Kingdom's control of dominant firm abuse may be quoted.

> Regulating powers are not limited... to the eradication of policies which are indulged in for the purpose of preserving market domination... regulatory powers can extend to policies which are simply the consequences of market domination... such as unduly high prices or excessive profits.[29]

In this connection, a statement by the Monopolies Commission in one of its reports is of particular interest.

> When... success leads to a position of market dominance... it involves... responsibilities to the public interest. The public interest appears to us to require in the present case that the monopoly supplier should use his position to ensure that the consumer obtains good quality and efficient service at the lowest price consistent with a fair reward to the supplier.[30]

The power conferred on the government by the monopoly reference provisions can hardly be overstated. Provided that the monopoly conditions are met,and the 1973 Act reduced the market share requirement from 33 per cent to 25 per cent, a reference to the Commission, given the responsibility of reporting on any "steps... taken... for the purpose of exploiting or maintaining" the monopoly position, can subject to examination virtually all the activities of the firms to whom the reference applies, and lead to recommendations as to what actions might appropriately be taken.

The ability of a firm to take advantage of the profit-making opportunities presented by its position of market power is then liable to severe restraint insofar as the Secretary of State acts upon the Commission's recommendations. It deserves to be mentioned that this restraint does not apply, impartially, to all firms occupying a monopoly position. It can apply only to those firms the performance of which has been investigated by the Commission and found to produce results - or to involve specific practices - contrary to the public interest. There is, accordingly, a selective regulation which may or may not be rational given the actual public interest implications of the practices followed by powerful firms throughout the economy.

Although the Monopolies Commission is advisory only, it is from the authority to make references to the Commission that power derives. Hence, significance attaches to Parliament's decision in the 1973 Act, to extend this referral authority to the Director-General of Fair Trading, whose independent status has already been commented upon.[31] It is true that a monopoly reference proposed by the Director-General can be vetoed by a Minister, but it is unlikely that this veto power will be widely used, especially as the reference will already have been published. The Director-General, in his reference policy, can respond either to complaints about the behaviour of firms occupying monopoly positions, or to the assessments made by his officials of the strength of competitive barriers in various industries and the evidence or probability of practices harmful to the public.[32] The Secretary of State, it should be noted, may give general directions concerning the priorities to be adopted in references or the issues to be considered. Moreover, following a Commission report, it is the Director-General who conducts the negotiations intended to remedy those situations - or correct those practices found harmful to the public. And whether these negotiations result in a Ministerial order or undertakings, the Director-General will take on the task of supervision to make sure that the order or undertaking is being observed.[33]

Although limited by the resources available to the Commission, the United Kingdom's capacity to prevent abuses by dominant firms is substantial. And, to the extent that a willingness to make references might have been inhibited, prior to 1973, by the political environment within which such a reference was made, it bears repeating that any such political constraint, if it existed, has now been removed. The Director-General has thus assumed the central role in the administration of the monopoly control machinery.[34]

It is evident from its reports that the Monopolies Commission is prepared to reach very broad public interest decisions concerning the performance of a monopolistic firm. That the Commission is ready to make judgments relating to such practices as tying, price discrimination, exclusive dealing, and so on, is not surprising; concern with the implications of such behaviour when employed by a firm possessing market power has long been a theme of "antitrust"; it is of such practices that the term "monopolizing" is suggestive. In addition, however, the Commission interests itself in prices, profits, and costs. Judgments as to the reasonableness of particular prices, profits, and costs, are not particularly easy to make, even apart from measurement difficulties, as in the case of profits. In arriving at such evaluations, account must be taken of the degree of risk, the role of successful innovations in producing profits, the efficiency of the enterprise in keeping costs low or permitting them to rise. The opinion of customers in the "rightness" of the prices they pay may be given weight. In finding, as it has on more than one occasion, profits to be unacceptably high, and therefore prices, costs given, also unacceptably high, the Commission concerns itself not with monopolistic abuse in the narrow sense of directly anti-competitive acts or predatory behaviour but in the broad sense of the implications for consumer welfare of the way in which market power is exercised. This had led, as noted already, the Commission to recommend and the government to accept undertakings affecting prices and profits from dominant firms. In sum, then, a Commission investigation of a dominant firm covers much more than active monopolizing behaviour; in essence, the Commission assesses the way in which the firm performs and whether or not it is ensuring that the consumer obtains good quality and efficient service at the lowest price consistent with a fair reward to the supplier.

III. MONOPOLIZATION

Footnotes

18. In some 115 industries the leading firm was thought to be responsible for between 25 per cent and 33 per cent of production so that the 1973 market share change made such industries eligible for a monopoly reference, without the need to establish that 33 per cent of production was supplied by more than one person in such a way as to restrict competition. The decision to reduce the market share criterion was evidently related to research findings that "there is a much bigger chance that anti-competitive behaviour will occur" when "the four largest suppliers account for 40 per cent of the relevant market". Sir Geoffrey Howe, as Minister for Trade and Consumer Affairs, had, in 1972, referred to market dominance exceeding this "threshold range" and suggested that "a somewhat lower figure than a one third share of a market might be appropriate in new legislation". Even if one is prepared to attach substantial significance to the reported research findings, it is not clear that reducing the reference requirement from 33 per cent to 25 per cent adequately deals with the problem. It has been suggested that "an alternative threshold, i.e. either control of one third by one firm, or of one half by the four largest firms" might have been established instead. See James P. Cunningham, The Fair Trading Act 1973, (Sweet & Maxwell, London, 1974), at pp. 134, 135.

19. Great Britain, Monopolies Commission, Report on the Supply of Chemical Fertilizers (London, HMSO, July 24, 1959).

20. *Idem*, *Report on the Supply of Wallpaper* (London, HMSO, January 21, 1964).

21. *Idem*, *Petrol: A Report on the Supply of Petrol to Retailers in the United Kingdom* (London, HMSO, July 22, 1965).

22. *Idem*, *Colour Film: A Report on the Supply and Processing of Colour Film* (London, HMSO, April 21, 1966).

23. *Idem*, *Household Detergents - A Report on the Supply of Household Detergents* (London, HMSO, August 3, 1966).

24. *Idem*, *Films: A Report on the Supply of Films for Exhibition in Cinemas* (London, HMSO, October 28, 1966).

25. *Idem*, *Infant Milk Foods - A Report on the Supply of Infant Milk Foods* (London, HMSO, February 7, 1967).

26. *Idem*, *Man-made Cellulosic Fibres: A Report on the Supply of Man-made Cellulosic Fibres* (London, HMSO, March 4, 1968).

27. *Idem*, *Clutch Mechanisms for Road Vehicles: A Report on the Supply of Clutch Mechanisms for Road Vehicles* (London, HMSO, December 12, 1968).

28. *Idem*, *Breakfast Cereals - A Report on the Supply of Ready-Cooked Breakfast Cereal Foods* (London, HMSO, February 20, 1973).

29. R. Joliet, *Monopolization and Abuse of Dominant Position* (Faculté de Droit, Liège, 1970), p. 209.

30. From Monopolies Commission, *Report on Supply and Processing of Colour Film*, 1966. Quoted by Joliet, *Ibid.*, p. 202.

31. As V. Korah suggests, the Director-General's procedure need not be a reference to the Commission, "When he discovers that a dominant firm has restricted competition... will he refer the supply of the goods affected to the Commission, or will he husband his resources by negotiating with the firm? He might talk privately indicating that he is considering a reference because of certain conduct he considers undesirable. Many firms would then abandon the practice rather than distract their higher management with a time-consuming defence before the Commission." _Op. cit_., note 2, p. 307.

32. In his _Annual Report_ for the period November 1973 to December 1974, the Director-General of Fair Trading refers to the Office's development of an "economic information system to assist in the selection of possible monopoly references". (p. 9) The purpose of this information system is "to help identify those situations of deficient economic performance which result from the conduct of firms and the structure of their markets... The system takes into account such matters as trade and consumer complaints, pricing behaviour and level of advertising expenditure, the rate of merger activity as well as efficiency, profit performance and the extent of the contribution to inflationary pressures." (p.17) This information system is stated to have been useful in the selection of the Director-General's first two monopoly references.

33. The Director-General of Fair Trading is also responsible for keeping under review those undertakings given before the 1973 Act took effect and which were still operative.

34. This new situation is in line with recommendations made by Alister Sutherland in _The Monopolies Commission in Action_, _op. cit_.,

note 10, "The pressures on Ministers (to refer or not to refer: to apply remedies even less severe than those suggested by the Monopolies Commission) could be reduced or shifted if a new Registrar with supporting expert staff were created - to decide which goods/companies to refer to the Monopolies Commission, to provide the quantitative evidence, and to enforce the recommendations." p. 88.

IV. SPECIALIZATION AGREEMENTS

The United Kingdom's legislation contains no provisions dealing with specialization agreements as such. Such an agreement would meet the conditions of Section 6 of the 1956 Restrictive Trade Practices Act as an agreement "under which restrictions are accepted by two or more parties in respect of...

(c) the quantities or descriptions of goods to be produced, supplied or acquired"

and, perhaps, as well

"(d) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied."

Accordingly, the presumption of the 1965 Act would apply: the agreement would be contrary to the public interest and would be condemned by the Restrictive Practices Court unless the agreement succeeded in passing through one of the gateways established by the Act and, in addition, survived the balancing test. As is well-known, the Court has not been lenient in applying the gateways test, so that but a handful of restrictive agreements have been found not contrary to the public interest in the approximately twenty years in which the Act has been in effect.

Attention should be drawn to Section 9 (2) of the Restrictive Trade Practices Act 1968 (a revision of the 1956 Act) in which the Registrar of Restrictive Trading Agreements - now the Director-General of Fair Trading - may take steps whereby he need not bring agreements before the Restrictive Practices Court if it appears that the relevant restrictions

are not of such significance as to call for investigation by the Court. (A very similar provision had been in the 1956 Act.) In applying Section 9 (2) the Director-General has been concerned as to whether or not the agreement appeared capable of causing detriments to purchasers or other traders, recognizing that detriments might flow from a reduction of choice or from a diminution of the competitive pressures for efficiency.

A recent (1973-74) report on Restrictive Business Practices Developments in the United Kingdom[35] refers to three "Rationalization and Specialization" agreements to which Section 9(2) was applied, so that the agreements could be operated without the need for a public interest justification. One of these agreements is of particular interest from the specialization point of view. "One [company] agreed not to acquire the goods in question except from the other, not to manufacture the goods unless the other cannot deliver, and not to produce or supply certain new designs without first allowing the other an opportunity of quoting for the manufacture. The other company agrees to supply the specified goods to other customers only with the consent of the former company."[36]

In acting in this way, the Director-General eliminates the need to prove a public benefit that a Court examination demands, it being sufficient that the agreement is of no great significance and evidently incapable of producing public detriment.[37] It seems reasonable to suppose that specialization agreements involving small firms (of the sort promoted by Germany's policy) would be eligible for serious consideration for the application of Section 9(2).

IV. SPECIALIZATION AGREEMENTS

Footnotes

35. Organization for Economic Co-operation and Development, Annual Report on Competition Policy in OECD Member Countries, (No. 1, Paris, 1975).

36. Ibid.

37. It should be noted that, since 1968, one of the gateways available in a hearing before the Court does not require the demonstration of a positive public benefit. If, in the judgment of the Court, the restriction does not restrict competition to any material degree and is not likely to do so, the restriction becomes eligible for approval, depending on the unclear status of the balancing procedure in such cases. This is discussed in W.C.H. Erine, "The Competition Gateway", Journal of Business Law, 1974, pp. 394-400.

V. EXPORT AGREEMENTS

Export agreements are specifically exempted from the 1956 Act's presumption that restrictive agreements are contrary to the public interest. Section 8(8) provides that the part requiring regulation of agreements

> "does not apply to an agreement in the case of which all such restrictions... relate exclusively
>
> (a) to the supply of goods by export from the United Kingdom."

These export agreements must be registered with the Board of Trade (as of 1956) and with the Director-General of Fair Trading (as of 1973). This registration is no more than a method for making information concerning export agreements available to the government; there is no requirement that such restrictive agreements meet the public interest standard established by the 1956 Act. Doubtless the Office of Fair Trading will examine all such agreements to satisfy itself that they do, in fact, relate exclusively to exports and contain no other restrictions which would render invalid their exempt standing.

It is to be noted that although export agreements are beyond the reach of the 1956 Act, such an agreement may place the parties in a monopoly position which would permit a public interest reference to the Monopolies Commission. The 1973 Fair Trading Act states that

> 8(2)... a monopoly situation shall be taken to exist in relation to exports ... if
>
> (a) one or more agreements are in operation

which in any way prevent or restrict, or prevent, restrict or distort competition in relation to, the export of goods of that description from the United Kingdom, and

(b) that agreement is or (as the case may be) those agreements collectively are operative with respect to at least one quarter of all the goods of that description which are produced in the United Kingdom.

Accordingly, the Director-General of Fair Trading may refer to the Commission, as a monopoly condition relating to exports, an export agrement operative with respect to at least one quarter of the United Kingdom's production of the goods in question. The Commission, as with any monopoly reference, would conduct its public interest assessment and make whatever recommendations it thought appropriate to the Secretary of State. It should perhaps again be mentioned that the public interest criteria to be applied by the Commission differ from the public interest gateways that apply to other types of restrictive agreements.

One of the public benefit gateways of the 1956 Act has become known as the "export" gateway and is available as a possible justification to upset the normal presumption of the Act. Thus, the defenders of a restrictive agreement may argue that

> 21(f) ... having regard to the conditions actually obtained or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry

and the Restrictive Practices Court, if it accepts the argument, will then determine whether or not, on

balance, the restriction is reasonable given any detriments to the public associated with the restriction.

That this "export gateway" is rather awkwardly worded will not have escaped the thoughtful reader. That it is far from appropriate, given the balance-of-payments concern that caused its inclusion in the gateways, has been noted by several commentators:

> From the aspect of economic policy, the paragraph is crudely conceived, applying as it does a test based on an arbitrary proportion of export turnover which may have little relation to the effect of the agreement on the balance of payments.[38]

The gateway has, in any event, been of minimal significance in the application of the 1956 Act. In a number of cases heard by the Restrictive Practices Court, the parties to an agreement have attempted to justify their restrictions by pointing to an allegedly beneficial effect on exports. But in only one case - Watertube Boilermakers' Association[39] - was the argument accepted and the agreement found thereby not contrary to the public interest. That the domestic purchasers of boilers might have to pay a higher price than they would were the agreement not operating was held by the Court not to outweigh the overall national benefit resulting from the predicted maintenance of exports. That "the problem of discovering the public interest under this gateway calls for a delicate balancing of value judgments"[40] is evident.

V. EXPORT AGREEMENTS

Footnotes

38. Lord Wilberforce, Restriction Trade Practices and Monopolies (Sweet & Maxwell, London, 1966, Second Edition), p. 394. See also B.S. Yamey, "Some Issues in our Monopolies Legislation", The Three Banks Review (June 1962): "The wording of the exports paragraph does not mention the balance-of-payments at all, and focuses on other economic variables in a way which is not consistent with any rational objective of foreign economic policy." pp. 17,18.

39. In re Watertube Boilermakers' Agreement, L.R. 1. R.P., 1957-59, pp. 285-345.

40. A. Hunter, Competition and the Law (George Allen & Unwin, London, 1966), p. 120.

VI. PRICE DISCRIMINATION

The United Kingdom's legislation takes no position on the merits of price discrimination. In cases referred to the Monopolies Commission, however, the Commission will necessarily assess any discriminatory pricing policies that may be followed. Such an assessment is, however, no more than a judgment of the public interest implications of the practice in a particular situation.

In its investigation of industries between 1959 and 1975, the Monopolies Commission has condemned price discrimination in several instances as contrary to the public interest. The price differentiation between initial and replacement equipment was criticized in Electrical Equipment for Vehicles;[41] preferential prices to certain customers were criticized in Cellulosic Fibres;[42] relating prices to total purchases from suppliers was criticized in Electric Lamps;[43] price differentiation between customers or classes of customers was criticized in Chlordiazepoxide and Diazepam;[44] a pricing policy that acted as a deterrent to competitors and potential competitors through a differential price structure was criticized in Contraceptive Sheaths.[45] These are, to repeat, individual cases of price discrimination that the Monopolies Commission found objectionable and no generalizations as to a prevailing view on price discrimination are in order.[46]

In one reference - Electrical Wiring Harnesses for Motor Vehicles[47] - the Monopolies Commission was asked to examine "the quoting of uneconomic prices calculated to drive competitors out of business of supplying electrical wiring harness for motor vehicles". However, the Commission found that uneconomic prices were not quoted, so that the public interest aspect of the alleged practice did not arise.

Provisions relating to monopoly references make specific mention of price discrimination. It is stated, in Section 49(3) that a monopoly reference may specify, as an act to be investigated by the Commission in its consideration of actions that operate, or may be expected to operate, against the public interest, "any preference given to any person (whether by way of discrimination in respect of prices or in respect of priority of supply or otherwise) in relation to the supply of goods or services of that description".

Schedule 8 of the Fair Trading Act lists the powers that may be exercised by the appropriate Minister following a Monopolies Commission Report that found practices being followed which produced results contrary to the public interest. The Minister may issue an order which declares it to be unlawful (for the firms to which the order applies)

> to discriminate in any manner specified or described in the order between any persons in the prices charged for goods or services so specified or described, or to do anything so specified or described which appears to the appropriate Minister to amount to such discrimination.

Furthermore, an order may require a person supplying goods or services to "publish a list of or otherwise notify prices" and it can then be declared unlawful to charge prices differing from those set out in the list or notification.

To summarize, if a firm occupying a monopoly position is found by the Monopolies Commission to be practising price discrimination that is deemed contrary to the public interest, an order may be issued making the further carrying out of this discrimination illegal. Although the importance of the power to issue such an order should not be

minimized, it merits mentioning that it is more customary for a firm, after an adverse report by the Monopolies Commission, to give an undertaking to behave in a certain way - in this case, to cease practising price discrimination - so that an order need not actually be issued.

VI. PRICE DISCRIMINATION

Footnotes

41. Great Britain, Monopolies Commission, Report on the Supply of Electrical Equipment for Mechanically Propelled Land Vehicles (London, HMSO, December 18, 1963).

42. Idem, Man-Made Cellulosic Fibres, A Report on the Supply of Man-Made Cellulosic Fibres (London, HMSO, March 4, 1968).

43. Idem, Electric Lamps, Second Report on the Supply of Electric Lamps, Part I and II (London, HMSO, December 2, 1968).

44. Idem, Chlordiazepoxide and Diazepam, Report on the Supply of Chlordiazepoxide and Diazepam (London, HMSO, April 11, 1973).

45. Idem, Contraceptive Sheaths, Report on the Supply of Contraceptive Sheaths in the United Kingdom (London, HMSO, February, 1975).

46. One commentator on British antitrust policy has recommended that consideration be given to making specific anticompetitive acts illegal, punishable through the courts. "There is a case for the addition of price discrimination to the list of possibly objectionnable acts which taken together might constitute illegal harassment." M. Beesley, in G.C. Allen, et. al, op. cit., note 10, p. 79.

47. Great Britain, Monopolies Commission, Electrical Wiring Harnesses for Motor Vehicles, A Report on Whether Uneconomic Prices are Quoted (London, HMSO., June 13, 1966).

VII. BASING-POINT PRICING

The United Kingdom's antitrust laws are silent on the subject of basing-point pricing. A summary of Monopolies Commission's Reports from 1954 to 1975 reveals only one report - Supply of Plasterboard[48] - in which a basing-point pricing system was central to the public interest assessment. One supplier was found to have a total monopoly of the United Kingdom market, supplying all the plasterboard sold in the United Kingdom through wholly-owned subsidiaries. Although the Commission did not find an abuse of the firm's monopoly position, it did criticize the distribution system employed. In particular, the Commission recommended that

(a) the system of uniform delivered prices be abandoned and replaced by a differential price system that would reflect actual transportation costs, and

(b) users be allowed to collect plasterboard at the work at an ex-works price plus reasonable loading charges.

It is reported that the Secretary of State accepted these recommendations and asked the Director-General of Fair Trading to negotiate their implementation with the monopoly firm, taking into particular account the effects of a change from a uniform delivered price system.

As with any Monopolies Commission Report, it must be repeated that the criticism of the basing-point pricing system was directed to its use in a particular industry, and does not imply any generalized condemnation of the practice as against the public interest.

In one case in which the Restrictive Practices Co

found a restrictive agreement not contrary to the public interest - Cement Makers' Federation[49]; a basing-point pricing system had to be considered. Prices increased but by less than transportation costs, as buyers were located farther and farther from a cement works. The effect of the system, however, was not central to the Court's favourable verdict. That the price structure involved a subsidy to buyers located at a distance from a cement works and hence might be detrimental to nearby buyers was recognized: the issue was complicated, however, because such a price structure might continue in effect even if the agreement were ended, and it is this comparison that is relevant in the Court's analysis. With respect to the argument that "any freight averaging scheme involving a transport subsidy is detrimental to the public" the Court stated that "Whatever may be theoretical arguments in favour of this view... we do not think it applies to cement... there is no clear public interest in providing an economic inducement to site such factories [those using cement in a manufacturing process] near cement works if economies in the transport of cement to the factories are counterbalanced by the greater use of transport in moving the end product from the factories to the buildings or civil engineering works in which they are to be incorporated."[50] Hence, there was no reason to assign to the effects of the base-pricing system any detrimental consequence that might outweigh the other benefits the Court found outweigh in the restriction.

VII. BASING-POINT PRICING

Footnotes

48. Great Britain, Monopolies and Mergers Commission, Plasterboard, A Report on the Supply of Plasterboard (London, HMSO, January 21, 1974).

49. In re Cement Makers' Federation Agreement, C.R. 2 R.P., 1960-61, pp. 241-293.

50. Incorporated Council of Law Reporting for England and Wales, Reports of Restrictive Practices Cases, 1960-61, p. 285.

WEST GERMANY

COMPETITION POLICY AND PRACTICES

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I. INTRODUCTION

"Antitrust policy" or "competition policy" in West Germany stems primarily from the 1957 Act Against Restraints of Competition which came into effect on January 1, 1958, and, as amended, marginally in 1965 and significantly in 1973, remains the basis of policy today.[1] The Act, an extremely complex and comprehensive piece of legislation, deals with the whole range of antitrust matters: horizontal and vertical restrictions, dominant firms, resale price maintenance, competition rules, to name but a few. In this study, we are concerned only with the following: mergers, monopolization, specialization agreements, export agreements, price discrimination, and interlocking directorates. On certain of these topics the Act has much to say, and the experience is rich; on others, the Act has little if anything to say, and experience is consequently limited.

Reference must be made at the outset to the Federal Cartel Office, established by the 1957 Act. This office, under the presidency of Dr. E. Gunther, is primarily responsible for the administration of the Act, performing, in this role, functions of a semi-judicial as well as an administrative nature. Because of the substantial amount of discretion conferred on the Federal Cartel Office by the 1957 Act, the way in which the Act has been applied and interpreted rests heavily on the positions taken by the Cartel Office, subject, of course, to the wording of the legislation and to an appeal procedure, on points of fact or law, or even economic reasoning, to the Berlin Court of Appeals and, on points of law, to the Supreme Court.

In addition to administering the Act, the Cartel Office and in particular President Gunther, have, in Annual Reports and elsewhere, provided valuable

assessments of the strengths and weaknesses of the Act, from both an administrative and philosophical point of view. The Cartel Office has not hesitated to draw public attention to deficiencies in the Act and to urge the necessary amendments. The Cartel Office has taken the position that the purpose of the Act was to promote a competitive economy with the economic and other benefits judged to flow from such an economy; inadequacies and inconsistencies, in the light of this overall purpose, have been subjected to the Cartel Office's critical examination; the Cartel Office has stated its mandate to be the "protection of competition as the essential element of our free market economy."[2] The Office has employed its considerable independence to present a continuing case for the strengthening of the competitive environment within which business operates and for a vigorous use of the Act Against Restraints of Competition for this purpose.

1. INTRODUCTION

Footnotes

1. There are, of course, other laws which have implications for competition policy. Particularly worthy of mention is the Unfair Trade Practices Act. Certain trade practices are prohibited; bribery, disparagement, misuse of a brand or firm name are examples of unacceptable behaviour. Limits are set on advertising and promotion claims, and there is a control of reduced-price promotion schemes. In addition, there is a general condemnation of unethical trade practices, which has been applied in instances of deceptive advertising to solicit customers, unfair obstruction of a competitor's business, such as boycotting and destructive price cutting, appropriation of values created by another and so on.

   The Act is aimed at encouraging fair methods of competition, and at protecting individual firms against grossly unethical acts by their competitors; consumers also receive protection from the provisions having to do with advertising standards. Victims of unfair practices can sue for damages and injunctions may be sought to prevent repetition of unfair acts or practices. See H.M. Blake, General Editor, Business Regulation in the Common Market Nations, Volume III, West Germany, Kim Ebb, Editor, (McGraw-Hill Book Company, 1969) at pp. 50-52. (This volume will henceforth be referred to as Blake, or the volumes edited by Blake).

2. Federal Cartel Office, "The Federal Cartel Office", mimeo, January 1, 1974, p. 12.

II. MERGERS POLICY

The most significant development in the recent history of "antitrust" policy in West Germany is the introduction of merger control in the 1973 amendment to the 1957 Act Against Restraints of Competition. The lack of any means to limit or restrain competition-reducing mergers was, in the eyes of officials most concerned with promoting an effective competition policy, one of the main deficiencies of the 1957 legislation.[3] Attempts at that time to include a merger-control provision in the Act had been unsuccessful. Requirements that certain mergers be reported to the authorities, with a tightening up of this reporting requirement in 1965, plus the possibility of public hearings, were seen to fall far short of the logic of a policy intended to strengthen competition.[4] Nor was the power to prevent abuses by dominant firms thought to be an adequate substitute for the desired power to prevent the emergence, or strengthening, of dominant positions.[5] Hence, a main recurring concern expressed by Dr. E. Gunther, President of the Federal Cartel Office, was the need for an amendment to the Act to bring mergers within the control of his Office.[6] The 1973 amendment reflects the acceptance by government of his views, and indicates a recognition of the economic implications of an increasing concentration that unchecked merger activity could bring about, the inconsistency of an Act Against Restraints of Competition that was powerless to prevent mergers, and a shift in public concern from the cartels with which the 1957 Act had most effectively coped to market domination, either by single firms or by small groups of firms acting non-competitively. In a more general sense, the amendment may be said to demonstrate acceptance of the need for a policy to prevent certain undesirable changes in market structure, and rejection of the view that it was sufficient to have some control of the conduct or behaviour that particular structures permitted.[7]

The merger provisions of the Act, as amended in 1973, are contained in Sections 23 and 24. Both sections are long and complex; what follows is an attempt to elucidate the essential content of this part of the Act.

Section 23 established the notification requirement, and follows closely the conditions laid down in 1965:

> The merging of enterprises shall immediately be notified to the Federal Cartel Office, if
> 1) within the total area of application of this Act or in a substantial part thereof a market share of at least 20 per cent is obtained or increased by the merger or if a participating enterprise has a share of at least 20 per cent in another market, or
> 2) the participating enterprises altogether at some date during the closed business year preceding the merger had at least 10,000 employees or recorded a turnover of at least DM 500 million in this period.

Thus, notification is required if either a market share standard is met or if firms of a certain size are involved. It may be noted that the market share criterion specifically includes the case of a firm with "at least 20 per cent" in one market acquiring an enterprise in another, possibly unrelated, market regardless of the market share of the acquired firm.

The section goes on to list which "transactions shall be deemed mergers". In addition to the acquisition of assets and shares and other transactions there is a statement that a merger within the meaning of the Act will be assumed if there is:

> Any other combination of enterprises as a result of which one or several enterprises are able directly or indirectly to exercise a controlling influence on another enterprise.

According to Dr. K.E. Markert, of the Federal Cartel Office, this is to cover the formation of joint ventures in which the parent companies have made agreements for joint control of the activities of the venture.[8]

Section 24 describes the policy alternatives available for dealing with mergers to which the reporting requirement of Section 23 applies:

> (1) If it is to be expected that a market dominating position is created or strengthened as a result of a merger, the cartel authority shall have the powers specified in the following provisions, unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of market domination. . . If the [above noted] conditions are satisfied, the Federal Cartel Office shall prohibit the merger.

The power to prohibit a merger includes the power to dissolve a "consummated merger which has been prohibited by the Federal Cartel Office".

The "market dominating position" which is central to the Federal Cartel Office's assessment of the merger has been defined in Section 22:

> An enterprise is market dominating within the meaning of this Act insofar as, in its capacity as a supplier or buyer of a certain type of goods or commercial services,

1) it has no competition or is not exposed to any substantial competition, or

2) it has an overriding market position in relation to its competitors; for this purpose besides its market share in particular its financial strength, its access to the supply or sales markets of goods and services, its links with other enterprises as well as legal or actual barriers to the market entry of other enterprises shall be taken into account.

This "overriding market position" criterion was introduced in the 1973 amendment, as was the following:

It shall be presumed that
1) an enterprise is market dominating . . . if it has a market share of at least one third for a certain type of goods of commercial services; this presumption shall not apply when the enterprise recorded a turnover of less than DM 250 million in the last closed business year.

A number of comments may be made on these provisions:

1) The Federal Cartel Office is required to prohibit the merger if the conditions of Section 24(1) are met.

2) There is no "balancing procedure", as that concept is normally applied in discussions of mergers policy, at this stage. The Office does not, for example, balance any efficiency gains of the merger against competitive effects nor does it assess the merger from some more general public interest point of view.[9] (With respect to the efficiency issue, in one case it was reported that "possible rationalisation advantages" would have

"in the long run only strengthened the efficiency of the participating enterprises but not improved the conditions of competition"; accordingly, the Cartel Office did not approve the merger.) The balancing that takes place is performed entirely within a competition framework: it is only "improvements in the conditions of competition" that can excuse an otherwise prohibited merger at this stage. It appears, thus, that the Cartel Office is undertaking a significantly more manageable task than would be the case were it required to take a variety of considerations into account. It appears, consequently, to be making less of a policy decision than is the case in, say, the United Kingdom, where the Monopolies Commission (operating, however, in an advisory capacity only) is authorized to consider all matters it deems relevant in a merger reference. The Cartel Office can - in fact must - focus upon its obligation to protect competition without being distracted by other concerns. It can, that is, work within the confines of an unambiguous philosophical position.

3) The burden of proof is placed squarely upon the participating enterprises. It is up to them to " prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of market domination".

4) One can hardly predict how effective this competition-improving defence will be in cases considered by the appropriate decision-section of the Federal Cartel Office. It is, however, not easy to imagine the type of argument likely to be persuasive, especially if the market-dominating position is found to exist because the one third market share criterion is satisfied. It is especially difficult to visualize this competition-improving argument being successfully employed by the leading (and dominant) firm in an industry. For such firms, the law may amount almost to a <u>per se</u>

prohibition of acquisitions, except of enterprises with a turnover of less than DM 50 million, such acquisitions being automatically exempt. This so-called "petty" clause may, it deserves to be noted, permit a leading firm gradually to expand its share of the market, without running foul of the law.

The legislators were not prepared, however, to let the fate of a merger be decided by the Federal Cartel Office solely on competition grounds. Despite a willingness to assign great weight to the value of competition, the government saw the need for an "escape clause" or for an opportunity of a "second look". Accordingly, Section 24 goes on to say that "it shall be inadmissible to consummate [a prohibited] merger without the authority of the Federal Minister of Economics" and "a consummated merger which has been prohibited by the Federal Cartel Office shall be dissolved, unless the Federal Minister of Economics authorizes it". More particularly,

> Upon application the Federal Minister of Economics shall authorize the merger, if in the case involved the restraint of competition is outweighed by advantages to the whole economy resulting from the merger or if the merger is justified by an overriding interest of the public; in this respect also the competitiveness of the participating enterprises in markets outside the area of application of this Act shall be taken into account. The authorization may only be given if the extent of the restraint on competition does not endanger the market economy.

The authorization may contain restrictions and conditions, and procedures for revoking authorizations are laid down.

It is evident that the significance of the merger provision will depend greatly on the way in

which the Minister of Economics uses this authority. Apart from the obligation not to sanction a "restraint on competition" that "endangers the market economy" he is free to exercise his discretion in terms of "advantages to the whole economy" or an "overriding interest of the public", phrases not defined. That he is specifically required to take into account the implications on the merger for the competitive position of the enterprise in export markets should, however, be noted. As he is using criteria quite different from those of the Federal Cartel Office, his overriding an Office decision to prohibit a merger need not imply a conflict; it is to be expected, however, that the legitimacy of the competition standard would be weakened by frequent Ministerial reversals of competition-oriented judgments of the Cartel Office. In any event, the policy nature of any decision to permit a merger which weakens competition is made clear by placing this permission power within the Ministry of Economics.

Mention should also be made of the Monopolies Commission created by the 1973 amendment. The Commission, to consist of "five members who must have special knowledge and expertise in the fields of economics, business administration, social policy, technology or commercial law", will "render regular opinions on the trend of business concentration" and the application of the merger and dominant-firm abuse provisions of the Act. In particular, the Federal Minister of Economics "may request an opinion from the Monopolies Commission also in particular cases which are submitted to him for decision" in an appeal against a Federal Cartel Office merger prohibition.

It is premature to judge the significance of the Commission in the development of competition policy. It provides, potentially, a valuable external assessment of policy decisions, and is a source of continuing judgment of the effectiveness of the Act Against Restraints of Competition,

primarily in relation to trends in business concentration and the efficacy of mergers policy in relation to such trends. It should be noted, as an indication of the Commission's independence, that in its February 1975 Report, it argued that a merger authorized by the Minister of Economics should have been permitted only under certain conditions, and that the extent of the authorization was excessive in relation to the admittedly valid reasons advanced by the Minister in overturning the Cartel Office's initial prohibition.[10]

It is too soon to attempt an assessment of the impact of this newly-added merger provision. On the face of it, a potentially powerful merger-control instrument has been established. In addition to mergers actually prohibited, there will be merger projects not proceeded with, in some cases following discussions with the Cartel Office. With respect to the critical position of the Minister of Economics in the whole procedure, a recent paper by Dr. Kurt Stockmann of the Federal Cartel Office may be quoted:

> It is in particular too early [the paper was presented in January 1975] to decide whether the lawmaker's expectations that the Minister's of Economics permission should be limited to few exceptional cases will come true in the end because there have been only five prohibitions up to now of which one only was overturned by the Minister's special authorization.[11]

It again deserves mention that during the first 15 years of the Act _Against Restraints of Competition_, no authority to prohibit mergers existed. The lack of such authority disturbed many of the supporters of an effective competition policy, and their arguments in favour of a merger control policy were often urged. The 1973 amendment is an indication that, after years of inaction and indecision, policy-makers determined that in an

economic system in which free markets and free competition were considered central to the proper functioning of the system, the decision of private firms to merge was a matter of substantial public concern. Accordingly, a control procedure, operated through the Federal Cartel Office and the Minister of Economics, was established and the prohibition capacity long asked for was created.

II. MERGERS POLICY

Footnotes

3. "From the beginning, the decisive defect of the Act Against Restraints of Competition has been its failure to provide for merger control." English Summary, 1969 Annual Report of the Federal Cartel Authority. See also Dr. K. Stockmann, "Antitrust Problems in the International Sphere-German Antitrust Law": "The most important deficiency was the lack of an efficient merger control. The law provided for a notification procedure for mergers of a certain significance but not for the power to stop anticompetitive mergers or to impose conditions mitigating the anti-competitive effects." (The World Trade Institute, New York, N.Y., Conference, January 27-29, 1975, mimeo) p. 3.

4. The original merger reporting requirement was in terms of a market-share criterion - 20 per cent or more of the market - so that its applicability to a specific merger could be a matter for debate. In 1965, additional criteria were established - number of employees, annual turnover, value of assets. The 1965 amendment also authorized the Cartel Office to call for a public hearing. The main point, however, is, that though this reporting requirement provided some evidence of the significance of mergers in the economy, there was no possibility of intervention to prevent any resulting increase in concentration.

5. This abuse provision was strengthened, however, in the first amendment to the Act in 1965, and again in 1973.

6. For example, in his paper "Two and One Half Years of German Antitrust Policy" Dr. Gunther wrote, "The question involved is simply one of recognising that any forms of the expansion of economic power by mergers weaken the foundations of a competitive system and that a criterion must be found according to which such associations are admissible or inadmissible in a free market economy." From Cartel and Monopoly in Modern Law. (Karlsruhe: C.F. Muller, 1969) p. 107. And in his later paper "Ten Years of the German Federal Cartel Office: Review of Past and Future Trends", Dr. Gunther, after commenting that the authority to control abuses by dominant firms had been an "ineffective instrument", stated that "A preventive rule of this kind [whereby certain mergers might be prohibited] would be more consistent with our competitive policy and the market system than control of abuses." And he went on to urge the necessity of "purposive influence upon market structures, i.e., in our particular case, through preventive merger control and deconcentration of powerful or dominant firms." The Antitrust Bulletin (Winter 1968) pp. 1456, 1469. A deconcentration policy, of course, goes beyond merger control, as it implies the breaking up of large firms, whether their size has been the result of mergers or not.

7. In discussing the German situation, and the significance of the 1973 amendment in particular, Dr. K. Stockmann, of the Federal Cartel Office observed that "The general atmosphere in Germany has become, in the last years, more and more favourable for antitrust. . . I must say that there is a probability that antitrust in Germany, which is already among the toughest in the world, will get even tougher in the future." Dr. Stockmann, of course, had developments in addition to those relating to merger control in mind. See Stockmann,

op. cit., note 3, pp. 20-21.

8. Kurt E. Markert, "The New German Antitrust Reform Law" in *The Antitrust Bulletin* (Spring 1974), p. 142.

9. Such a balancing had been suggested earlier. Dr. Gunther, in his "Ten Years of the German Federal Cartel Office", *op. cit.*, note 6, reports a suggestion of the Economic Advisory Council in the Federal Ministry of Economics that, in cases where a "merger materially restricted competition but led to substantial real cost savings" the Federal Cartel Office would have to consider "whether this advantage really exceeds the disadvantage of increased monopolization".

10. See Markert, *op. cit.*, note 8. The Commission's "role is supposed to be that of a political watchdog, particularly with respect to the application of the powers of the Economics Minister to grant special exemptions", p. 146.

11. Stockmann, *op. cit.*, note 3. p. 13.

III. MONOPOLIZATION

If "monopolization" is taken to mean the "deliberate use of 'other-than-normal' business practices to achieve, maintain and exploit a position of market power" then the German Act Against Restraints of Competition does not specifically cover monopolization. However, if, the term is given a more general meaning: the practices, whether "normal" or not, whereby a firm with market power abuses its position, then the German legislation contains provisions, primarily in Section 22, dealing with monopolization. In any event, it is to Section 22, having to do with abuses by dominant firms, that this section of the report on Germany will be devoted.

The German experience with the administration of its abuse-by-dominant-firm section, points to the nature of the major problems involved in the administration of such legislation:

1) The definition of market dominance and the consequent difficulty facing the administrator - in this case, the Federal Cartel Office - in applying the legislation to particular firms. An important feature of the 1973 amendment was an elaboration of the concept of market domination, in such a way as to facilitate the Cartel Office's application of the provision.

2) The definition, or interpretation, of the concept of abuse and the consequent limitation on the practices to which the authority can object. The 1965 amendment corrected the weaknesses resulting from a restrictive concept of abuse employed in the original 1957 legislation, and the acceptance of the argument that a non-competitive price is itself an abuse has expanded the areas in which the Office can intervene.

3) The implications of abuse provisions for the extent of intervention in the operations of a dominant firm on the part of the administrators. This may produce a consequent conflict between the detailed control thereby required and the more philosophical concern of the administrators of competition policy to maximize, subject to the law, the freedom of individual decision making.

4) The possibility that an (apparently effective) control of abuse by dominant firms will divert attention from the importance of policics, such as merger control, to check the emergence of market structures likely to be productive of abuse. It has already been noted that Germany had provisions to deal with dominant firm abuse for some 15 years (1958-1973) before authority to prohibit mergers was finally assigned to the Federal Cartel Office; it would, however, be incorrect to suggest that the Office ever felt that the abuse provisions were of sufficient power to eliminate the need for an effective merger control policy. Opponents of an effective mergers policy could, of course, always point to the protective function of the abuse provisions.

The original definition of market domination used in Section 22 - with which the Federal Cartel Office had to work until the 1973 amendment - was as follows:

> Insofar as an enterprise has no competition or is not exposed to any substantial competition in a certain type of goods or commercial services, it is market-dominating within the meaning of this Act.

The Cartel Office was required, accordingly, to satisfy itself that a firm met this criterion - subject to appeal to the Berlin Court of Appeals - before action to remedy an abusive situation could be undertaken. Stockmann has commented on the "necessity to establish the existence of market dominating power by the establishment of the absence

of 'substantial competition'", which "required a very difficult conduct test as regards the competitive conduct of all enterprises in the relevant market".[12]

The 1973 amendment expanded on this definition in two ways. First, the concept (already noted) of an overriding market position was introduced.

> An enterprise is market dominating. . . insofar as. . . it has an overriding market position in relation to its competitors; for this purpose besides its market share in particular its financial strength, its access to the supply or sales markets of goods and services, its links with other enterprises as well as legal or actual barriers to the market entry of other enterprises shall be taken into account.

How this criterion will be applied remains to be seen; however, it seems to be most applicable to the large conglomerate organization possessing substantial resources, though perhaps not occupying a dominant position in any one market.[13]

Perhaps more important, the 1973 amendment went on to state that it was to be presumed that:

> An enterprise is market dominating. . . if it has a market share of at least one third for a certain type of goods or commercial services.

Thus the task of the Cartel Office in dominant firm cases is reduced from the need to show an absence of any substantial competition to the rather less demanding obligation to establish a one third market share for some commodity or service that will be acceptable (if appealed to the Berlin Court of Appeals) as a "certain type of goods or commercial services".

The concept of market domination is also applied to oligopoly situations. In the initial version, the Act reads:

> "Two or more enterprises are deemed market-dominating insofar as, in regard to a certain type of goods or commercial services, no substantial competition exists in fact between them in general or in specific markets, and they jointly meet the requirements of subsection (1) [no competitor or no substantial competition].

The recent amendment makes the oligopoly concept much more precise and, therefore much more easily applied by the Cartel Office.

> These conditions are satisfied if, in regard to a certain type of goods or commercial services,
>
> a) three or less enterprises have a combined market share of 50 per cent or over, or
>
> b) five or less enterprises have a market share of two thirds or over.

When these structural conditions are met, it follows that a situation of joint market domination exists; though, according to Markert and Stockmann, evidence of active competition amongst the firms involved may be introduced to rebut the presumption. It should perhaps be stressed that satisfying these market share criteria - or any other definitional criteria - does not constitute abuse. There is nothing objectionable in market dominance in itself.[14] It simply means that the firms are in a dominant situation in which abuse may be found and proceeded against.

The concept of abuse, as first formulated in 1957, was confined to "abusive prices, conditions

or tying clauses in regard to goods and services as to which the enterprise was market dominating". In 1965, however, "the control was extended to all types of abuses and . . . also to abuses in markets in which the enterprise was not dominating".[15] The Act now reads as follows:

> In regard to market dominating enterprises, the cartel authority shall have . . . powers . . . insofar as these enterprises abuse their dominating position in the market for these or any other goods or commercial services . . . the cartel authority may prohibit abusive practices by market dominating enterprises and declare agreements ineffective . . . Prior to such action, the cartel authority shall request the parties involved to discontinue the abuse to which objection was raised.

The requirement that the Cartel Authority "request the parties involved to discontinue the abuse" should be noted. Section 22, as has been pointed out, does not attempt to list particular practices or policies which will be considered abusive. The abusiveness of specific practices or policies will depend on the circumstances of the case. Hence, firms can hardly be held accountable for acting in ways which, in the judgment of the Cartel Office - and upheld by the Berlin Court of Appeals - are deemed to be abusive. It is, of course, true that, as cases accumulate, an understanding of what practices are likely to be found abusive should emerge and give guidance to firms occupying dominant positions. For many years, however, Section 22 cases were so rare, that little such guidance formally developed. The reasonableness of this "request procedure" is thus evident.

Although Section 22 is of greatest interest, note must be made of Section 26 (2) which deals further with market dominating enterprises, as well as with approved cartels and enterprises with

price fixing authority. Such enterprises "shall not unfairly hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such differentiation treat such enterprise directly or indirectly in a manner different from the treatment accorded to similar enterprises". This amounts to the proposition that a market-dominating enterprise may not discriminate in prices between or differ in its willingness to supply legitimate customers. The Federal Cartel Office has, in recent years, used Section 26 to require a vertically integrated firm to continue to supply independent customers in addition to its own outlets; to compel a dominant firm to make supplies available to new customers as well as to regular buyers; to prevent an importer from ceasing to supply certain long-established customers because they did not fit into a planned distribution system. The Berlin Court of Appeals did not uphold the Cartel Office on all points, but apparently did not challenge the Office on any matters of principle. The 1973 amendment strengthened this provision by making it applicable, not only to market-dominating enterprises, but, as well, whenever "suppliers or purchasers of a certain type of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of switching to other enterprises do not exist".[16] Clearly, Section 26 singles out discrimination, and associated practices, as an abuse deserving of particular mention. To quote Joliet, "Discrimination, including discriminatory refusals to deal, was treated [by Section 26] as a special case of abuse of dominant power."[17] It is also to be noted that violations of Section 26(2) are directly actionable by the injured party.

In discussions of abuse control, a distinction is often made between "hindrance" abuses and "exploitation" abuses; the Federal Cartel Office has interpreted Section 22 as giving it the right

to intervene in both cases and this interpretation has been upheld. The terms are, perhaps, self-explanatory. Hindrance abuses are those practices whereby a dominant firm uses its market power to hinder the legitimate business operations of some other business enterprise, which may or may not be a competitor of the dominant firm. As such abuses involve particular acts, or policies, it is relatively easy to order the abusive firm to desist from the objectionable practices, or to convince it, through negotiations, to conduct its affairs differently. (The finding, to illustrate, that a refusal to supply is abusive, implies an obligation to supply.) An exploitation abuse on the other hand, results when a firm in a dominant position charges, for example, a price that is unreasonably high, to the detriment, not of particular customers, but of the consuming public generally. (The finding that a particular price is abusively high does not imply that a particular price must be set in order to eliminate the abusive behaviour. Any price lower than the original price may be said to remove the abuse. The distinction between the right to declare a certain price to be abusive and the right, which, it can be suggested, is implicit, to indicate what price is acceptable has been a source of much discussion in commentaries on Section 22.) Dealing with such abuses raises a range of problems of a particularly perplexing nature.[18]

The Federal Cartel Office has adopted the view that a market-dominating firm is acting abusively and in violation of Section 22 if it sets prices that could not be maintained under workably competitive conditions. The standard is the price that would be established were the market adequately competitive; a pricing policy that produces prices persistently above this competitive standard is abusive and therefore condemned. Determining what the competitive price would be is, of course, far from easy, with the Cartel Office typically looking for other geographic

or product markets which permit a reasonable comparison to be made. In short, under the concept of "exploitation abuse", the Cartel Office is prepared to assess from a Section 22 point of view the prices established by those dominant firms the conduct of which it is investigating. Hence, through Section 22, and this abusive-pricing doctrine, the Cartel Office finds itself in - or has assigned to itself - the task of a price-monitoring operation. The appropriateness of such a function has been questioned by critics of the Cartel Office.[19]

Dr. Gunther, President of the Federal Cartel Office, is mindful of the philosophic issue flowing from Cartel Office interference with particular prices.

> The Federal Cartel Office was charged by some commentators with arrogating to itself the role of a price commissar . . . the competitive system is confronted by a dilemma . . . With the present means of the cartel law, the problem of so-called administered prices, which are set by enterprises without control by competition, can scarcely be solved . . . when other means of loosening frozen market structures are not at our disposal, governmental cartel policy must necessarily intervene by regulation. I realize that it is difficult to insert intervention thus bordering on dirigism into a competitive system based on the principle of freedom. It is all the more urgent to attack preventatively the development of market conditions that leave us no other choice than either to intervene by regulation or to leave what happens in the market wholly to a few powerful enterprises.[20]

During most of the time when the Act Against Restraints of Competition has been in effect, the inadequacy of Section 22 to deal with abuses by dominant firms has been noted by Cartel Office officials. Writing in 1968, Dr. Gunther stressed the difficulties presented by the obligation to establish market dominance by reference to the "no substantial competition" requirement with the result that "this instrument is ineffective". The weaknesses of the abuse-control provision strengthened the case for a merger control policy, whereby mergers leading to market domination might be prevented. The 1973 amendment, in introducing merger control and in strengthening the abuse provisions, by means of a more manageable set of criteria for dominance, reflected government concern with the development, as well as the abuse, of market power. The new criteria may be interpreted as a conscious effort to make it easier for the Cartel Office to establish market domination, and therefore easier to bring under control the conduct of powerful firms or groups of firms.[21] Section 22 appears likely to be more vigorously applied than in the past, as the Cartel Office makes use of the very general concept of abuse introduced in 1965 and the new criteria of 1973. It may also be noted that the effect of Section 22 may be partially hidden, as dominant firms are deterred from embarking on certain policies because of an abuse charge possibility. And the section is being used increasingly to deal with cases in which dominant firms set unreasonably high prices. Becoming clear are the problems involved in a price-monitoring and regulating activity in the absence of any indication of what an acceptable price is other than the imprecise concept of the price that would emerge under conditions of effective, or workable, competition.

III. MONOPOLIZATION

Footnotes

12. Stockmann, _op. cit_., note 3, p. 9.

13. Stockmann has written that "the introduction of the criterion of an 'overriding market position' has not yet [January 1975] led to a decision in an abuse control proceeding although the philosophy underlying its introduction has played a role in some cases. The criterion is relative in nature, referring to market power _vis-à-vis_ competitors. Consequently, e.g., the financial power of a great concern in a certain market will not satisfy this criterion if at least some of the competitors are equally powerful." _Op. cit._, note 3, p. 10. According to Markert the "overriding firm" criterion "was expressly intended [to reach] vertical integration and conglomerates". _Op. cit_., note 8, p. 138.

14. It could be argued that the new merger provisions imply that a position of market domination is inherently undesirable, and hence not to be achieved via the merger route except with the special approval of the Minister of Economics.

15. Stockmann, _op. cit_., note 3, p. 9.

16. Markert states that the "aim of this provision is to establish a limited prohibition of refusal to sell in cases of provided articles of high reputation. The provision is also intended to apply to situations in which integrated firms refuse to supply independent distributors on the ground that the available goods are needed for the company-owned distribution system." _Op. cit_., note 8, p. 139.

17. R. Joliet, Monopolization and Abuse of Dominant Position. Faculté de Droit, Liége. Martinus Nijhoff, La Haye, 1970, p. 155.

18. The problems are of two sorts. (1) By what criteria will the reasonableness (non-abusiveness) of a price be determined, and (2) what are the implications for a competition policy of its administrators assuming the power to judge the acceptability of particular prices?

19. Joliet has pointed out that "the concept of abuse can be construed . . . to include only the improper exercise of market dominance . . . or [any] conduct which would have been impossible in the face of effective competition. . . the Federal Cartel Office has clearly adopted the second test [any conduct] which would have been impossible in the face of effective competition". Op. cit., note 17, pp. 159, 160. Dr. H. Barnikel of the Federal Cartel Office has written "In attacking abuses the Cartel Office acts according to the following principle: Market dominating enterprises are to be conceded no more influence than is possessed by those enterprises that are exposed to significant competition. Any other point of view would not be in keeping with the basic principle of the Act Against Restraints of Competition which is the protection of competition." He then refers to a 1967 Supreme Court decision which "contains a basic statement of what is to be considered an abuse in cases of allegedly excessive prices: In principle, only those prices may be charged that can be obtained under conditions of competition." "Control of abuses that is exercised in accordance with the principle of competition seeks to enforce those prices that would result from workable competition. These who . . . believe that it

is necessary to keep market-dominating enterprises under effective control, have no choice but to support the activities of the Cartel Authority, even if these deal with prices [even though this kind of control of abuses may be called government interference]." H. Barnikel, "Abuse of Power by Dominant Firms: Application of the German Law", Antitrust Bulletin (Spring 1969) pp. 231, 233, 240. Again to quote Joliet: "The test involves a comparison of the dominant firm's actual operations with what its performance would have been under workable competitive conditions . . . The main objection to that theory of abuse is that it amounts to making the Cartel Office a sort of public utility commission, since there is no objective standard for measuring the excellence of the monopolistic behaviour and performance with regard to such things as prices . . . The answer of the Federal Cartel Office [is that] . . . in the absence of control of market structures there is no other way [available to it, to prevent abuse]." Op. cit., note 17, p. 161. It may be noted that the Monopolies Commission, in its first report argued that abuse supervision should focus on cases of hindrance abuse or abuse of price structures with any control of the price level to be handled very cautiously.

20. E. Gunther, Antitrust Bulletin, Fall 1968, p. 1018.

21. Markert is quite explicit on this point. The aim of the new definitions of market domination "is to enlarge the scope of market domination in the legal sense and to ease the burden on the cartel authorities in demonstrating the existence of market dominance in individual cases". Op. cit., note 8, p. 137.

IV. SPECIALIZATION AGREEMENTS

Section 1(1), of Chapter 1, Cartel Agreements and Cartel Decisions, establishes the essential position of the 1957 Act Against Restraints of Competition on horizontal restrictions of competition. It provides in part:

> Agreements made for a common purpose by enterprises or associations of enterprises and decisions of associations of enterprises are of no effect insofar as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial service.

This forthright condemnation of restraints on competition is immediately qualified by a series of exemptions which permit certain types of competition-restricting agreements on the grounds that such restrictions have redeeming features which justify waiving the general condemnation. Such restrictions differ in the difficulty of getting the exemption authorized, the degree of difficulty being linked to the extent of the competitive effect involved.

Eligible for exemption are "rationalization agreements" which serve "to rationalize economic processes and are likely to raise the efficiency or productivity of the participating enterprises. . . the rationalization effect must be adequate in relation to the restraint of competition connected with it". The cartel authority will approve a rationalization agreement, upon application, if it is satisfied that these requirements are met.

Specialization agreements are regarded as a particular type of rationalization agreement, but with rather different requirements for exemption. In a specialization agreement, each participating

firm normally agrees not to produce certain lines, or sizes, or colours, the production of which is assigned to other cartel members. Inasmuch as each firm will wish to offer a "full line" - which objective explains the lack of specialization in the first place - the cartel members will normally agree to make their particular line of the product available to all other member firms. If there are economies of large-scale production available, costs can be reduced by having, say, two of 10 firms each produce 50 per cent of the group's output of a particular line rather than having each firm produce approximately 10 per cent of total output.

The overall condemnation of Section 1 does not apply:

> To agreements and decisions the object of which is the rationalization of economic processes by specialization, provided that significant competition continues to exist in the market.

Such a specialization agreement takes effect if not objected to by the cartel authority within a period of three months after notification (an "objective cartel") rather than requiring, as do other rationalization agreements, the specific approval of the authority (a "permission cartel"). The criterion that "significant competition continue to exist" is also less onerous than the similar criterion for rationalization cartels. It is reported in the volume edited by Blake that "the requirement that significant competition continue to exist has not presented a major problem. . . since specialization agreements tend to be concluded between small and medium-sized enterprises".[22]

The present status of specialization agreements, as described above, reflects the 1965 amendment, prior to which time specialization cartels were treated in the same way as other rationalization cartels, requiring the specific approval of the cartel authority. By making specialization cartels

valid three months after notification unless objected to by the cartel authority, the government clearly intended to reduce the inhibiting effect on specialization that the need for specific authorization was thought to produce. According to Blake, "the protection of small enterprise . . . was often used [in governmental deliberations] to justify the relaxation of rules governing specialization cartels. . . This relaxation was intended to bolster the competitive position of small enterprises." In fact, it appears that this 1965 amendment merely confirmed actual practice. "Although the Federal Cartel Office originally examined these agreements in the same way as other rationalization cartels, in 1963 it published a set of principles of administration which amounted to prima facie rules for approval of specialization agreements. Thereafter, approval proceedings ordinarily took no more than two months."[23]

The philosophy behind this preferential treatment of specialization agreements is that "specialization brings to small and medium-sized enterprises the advantages of large-scale production and thereby improves their competitive position", a consideration that helps to explain the generally lenient approach of the Cartel Office prior to 1965 and the facilitating amendment of that year. This liberalization also extends to other restraints judged "necessary to achieve the specialization" such as a common sales agency, agreements to supply other cartel members at fixed prices, and so on. In short, although a specialization agreement limits competition between the participants, it may be regarded as a mechanism whereby competition is simultaneously strengthened by improving the competitive ability of small businesses, the support of which is considered in the public interest, for both economic and social reasons.[24]

Concern with the economic position of small and medium-sized enterprises is evident in a 1973 amendment dealing with co-operative undertakings (Section 5(b)). The overall prohibition of Section 1 is not to apply

> To agreements and decisions whose object is the rationalization of economic activities by a type of co-operation between enterprises (other than specialization) if competition on the market is not thereby substantially impaired and the agreement or decision serves to promote the efficiency of small or medium-sized enterprises.

Although this provision refers to co-operation other than specialization, in fact the first application of the regulation strengthened an already existing specialization agreement by permitting the acceptance of additional restraints which, prior to 1973, would have been rejected by the Cartel Office. The small size of the participating firms relative to their large competitors was a factor in the Cartel Office's approval.[25]

As of March 1975, 54 specialization agreements were in effect. Of these, six had been established in 1973/74, and the 54 agreements still effective were drawn from a total of 75 approved since the Act came into force in 1958. In addition, seven co-operation cartels had been approved since the 1973 amendment, and all were still operating in March 1975.

Firms participating in a specialization agreement to which the Cartel Office has not objected are not thereby freed from all responsibility to the Office. Section 12 states that, in the case of specialization (and other) agreements, the cartel authority may, if

> the agreements and decisions or the manner of giving effect to them constitute an abuse of the market position obtained as a result of the exemption . . .

1) direct the enterprises taking part to abstain from the abuses . . .

2) direct the enterprises taking part to amend the agreement or decisions, or

3) invalidate agreements and decisions.

In addition, Section 26, already noted in our discussion of dominant firms, also applies to approved or permitted cartels, including specialization cartels. They must not unfairly hinder other enterprises in their business activities, nor may they treat other enterprises in a manner different from the treatment accorded to similar enterprises.

In summary, it seems fair to say that specialization agreements occupy an especially preferred position in the category of agreements exempt from Section One's prohibition. The support of such agreements rests, not primarily on the overall economic benefits derivable from the cost reductions specialization is thought likely to produce, but on the proposition that the well-being of small and medium-sized enterprises, an essential component of a healthy competitive economy, can be promoted by permitting - in fact, encouraging - such firms to participate in specialization - and other co-operative - arrangements. It seems not to be the possible gains in efficiency that are paramount, but, rather, the social and economic desirability of strengthening the viability of small enterprises in an economic environment characterized by increasing levels of concentration and a continued growth of firms of large size.[26]

IV. SPECIALIZATION AGREEMENTS

Footnotes

22. The significant competition provision did not deter the Cartel Office from approving a specialization agreement between firms with a combined market share of 30 per cent; however, a combined market share of 90 per cent in one specialization agreement did cause the Cartel Office to object on the grounds that significant competition would cease to exist. It has been suggested that only if the cartel becomes market dominating will the significant competition criterion tell against the cartel. Even before the 1965 amendment, the Cartel Office had approved specialization agreements covering 67 per cent of their product markets, weight being given to import and substitute competition. Blake, op. cit., note 1, pp. 201, 309.

23. Blake, op. cit., note 1, pp. 137, and 146.

24. Dr. Gunther indicated his approval of the specialization cartel provision. "The idea underlying this rule should be welcomed from the point of view of competition policy." In his opinion, however, the competition requirement should be that "competition must not be materially affected by the specialization concerned". "Ten years of the German Federal Cartel Office", op. cit., note 6, p. 1444.

25. In his discussion of this new "co-operation exemption" Markert writes that Section 5(b) "will probably be invoked mainly to legalize joint selling agencies of small- and medium-sized firms with aggregate market shares not exceeding 15 per cent". It is noted that large firms may participate in such cartels if it is

in the interest of the participating small- and medium-sized firms. Op. cit., note 8, p. 148.

26. A recent study by the Federal Cartel Office revealed that in all of the 12 economic sectors analyzed the level of concentration increased from 1962 to 1972.

V. EXPORT AGREEMENTS

Also exempted from the general ban on agreements in restraint of competition are export agreements.

The case of "pure export cartels" is straightforward. Section 6(1) of the Act Against Restraints of Competition provides that the general ban in Section 1

> shall not apply to agreements and decisions which serve to promote exports insofar as they are limited to regulating competition in markets outside the area to which this Act applies.

Such agreements are to take effect only if they have been notified to the cartel authority. No approval is required; notification is all that is necessary; the authority must, presumably, be satisfied that the cartel is in fact "limited to regulating competition outside the area to which this Act applies". A recent (July 1973) Supreme Court decision, however, is reported to have eliminated the need for pure export cartels to be registered with the cartel authority, if the cartel agreement has no effects within Germany. Hence, the already minimal power of the Cartel Office with respect to such cartels- the power to examine the terms of the agreement and assess whether or not it in fact met the automatic exemption criterion - is reduced even further.

The position of the Cartel Office in the case of export cartels with associated domestic restraints (mixed export cartels) is quite different from its status in relation to purely export cartels. Section 6 of the Act Against Restraints of Competition provides that application for approval of such cartels must be made when, in addition to the

regulation of competition in external markets, the

> regulation covers also trade in goods or commercial services within the area to which this Act applies, and the cartel authority must be satisfied that this domestic restriction is necessary to ensure the desired regulation of competition in the markets outside such area.

Moreover,

> comments of the domestic producers and purchasers affected shall be attached to the application.

It is clearly the intention here to minimize the possibility that restrictions justified because of their external consequences will be authorized when they have a detrimental impact on internal competition. Some weighting of the "internal cost" against the "external gain" seems implicit in the wording of the just-quoted provision, though the phrase "necessary to ensure the desired [external] regulation" seems to accord the top priority to the promotion of exports the external restraint is expected to produce. However, the importance of domestic competition appears in the immediately following requirement in Section 6(3) that

> No authorization . . . shall be granted . . . if the agreement or decision or the manner of its implementation . . . may lead to a substantial restraint of competition within the area to which this Act applies and if there is a predominating interest in preserving competition.

Though, on the face of it, the "predominating interest in preserving competition" appears capable of being sacrificed in the interests of the export achievements the "export cartel with associated domestic restrictions" is to produce.[27]

Between 1958 and March 1975, the Cartel Office was notified of 101 "pure export cartels" with 64 still operating in March of the present year. During the same period of time, 11 export cartels that included a regulation of domestic competition were authorized, with only four still operating.

President Gunther discussed export agreements in his assessment of "Ten Years of the German Federal Cartel Office".[28] He expressed doubts that the export cartels notified (or authorized) actually contributed substantially to Germany's export earnings. He was also doubtful that exports were, in all cases "secured and promoted" by these cartels, although this was the purpose specified in the exemption section. That such cartels - even "pure export cartels" - were confined in their impact to other countries was far from certain. That they might be used for restrictive domestic purposes was recognized by Dr. Gunther, as was the possibility that, "implicitly or expressly" the home market was included. "Such agreements may be used as an umbrella for restrictive practices in the domestic market." Why, he wondered, should Germany "give legal protection to protectionist instruments of private enterprise" given their general policy (writing in 1968) of taking a "liberal attitude) towards our trading partners".

V. EXPORT AGREEMENTS

Footnotes

27. In Blake, op. cit., note 1, the matter is described as follows: "The Cartel Office is required to approve such agreements if they are necessary to promote exports unless it finds that there is a substantial domestic restraint which outweighs the public interest in the promotion of exports." p. 201. It should be added that an export cartel must not be approved if it "violates the principles concerning trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties". p. 201.

28. Gunther, "Ten Years of the German Federal Cartel Office", op. cit., note 6, p. 1445.

VI. PRICE DISCRIMINATION

Reference has already been made, in the discussion of monopolization and abuse control of dominant firms, to Section 26(2) of the Act Against Restraints of Competition.

> Market-dominating enterprises, [plus exempt cartels, authorized price fixing firms] shall not unfairly hinder, directly or indirectly another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such differentiation treat such enterprise directly or indirectly in a manner different from the treatment accorded to similar enterprises.

This provision was strengthened by the 1973 amendment which made it also

> apply to enterprises and associations of enterprises, insofar as suppliers or purchasers of a certain type of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of switching to other enterprises do not exist.

As a result, obligation to supply is now imposed on firms which may not occupy a market position meeting the dominance criteria.

Section 38 declares that "an offence is committed by whoever . . . contravenes any of the prohibitions laid down in Section 26 . . . the offence may be punished by a fine of up to DM 100,000 beyond this amount up to three times the additional proceeds

obtained as a result of the infringement."[29] It has, however, been customary to settle informally cases involving a violation of Section 26, with the attacked practices being abandoned, supplies to an aggrieved enterprise being resumed, for example, or discriminatory conditions of sale being eliminated. The 1970 OECD publication, <u>Market Power and The Law</u>, states that "in Germany . . . the prohibition is primarily enforced in an informal way with a view to eliminating the detrimental effects of the prohibited conduct; by asking the enterprises concerned to desist from it, rather than by imposing the statutory sanctions by way of formal decisions".[30]

It is clear that any regulation which contains such terms as "unfairly hinder", "usually open to similar enterprises", "facts justifying such differentiation", and "a manner different from the treatment accorded to similar enterprises", presents administrators with a number of difficult tasks of interpretation. The intent of the provision may seem clear enough, its application to particular situations less obvious.

The problems involved in applying Section 26 are noted in Blake:[31]

> The qualifications [unfairly hindering, factually unjustifiable differentiation] are designed to secure an adequate balancing of the legitimate interests of the regulated enterprises and of those who face inherent or aggregated market power. . .

In the OECD <u>Guide to Legislation on Restrictive Business Practices</u> (Paris, 1974, Section 2.0 on Germany, page 4), it is stated that "the terms 'unfair' and 'unjustified' have to be interpreted as requiring a balancing of the legitimate interests of the affected parties".

The usual types of problem in applying such regulations have arisen: to what extent, for example, may a manufacturer refuse to accept orders from wholesalers he prefers not to be part of his distribution system? In a recent case, the Federal Cartel Office ordered a manufacturer to continue to supply a wholesaler who, on the basis of a long-standing relationship, and in the absence of immediately available alternative supplies, was deemed to be dependent on the manufacturer. That the wholesaler had based a substantial portion of his total business on supplies from this manufacturer was also viewed as important. It appears, however, that this obligation to supply will be in effect only for a transitional period during which the wholesaler is expected to establish business relations with suppliers of acceptable substitutes. It appears to be the case, as well, that newcomers to a particular line of business are protected by Section 26 in their right to obtain essential items from dominant suppliers.

Problems familiar to students of price discrimination have also been evident:

> Price differences may be justified by differences in unit cost to the supplier, resulting, for example, from handling large as against small orders. Discriminations with respect to prices are justified by the differences in the services rendered by the dealers . . . . Both quantity and functional discounts have been approved . . . Accounting data [on cost saving] have not been required nor has the amount of the discounts been very closely examined . . . . Functional differences may be granted to wholesalers for all kinds of services to a supplier: storage, post-sale maintenance or services, and risk bearing. [32]

VI. PRICE DISCRIMINATION

Footnotes

29. Furthermore, it has been stated that the German courts have recognized the right of the victims of actions undertaken in violation of Section 26 to sue for damages. See Organization for Economic Co-operation and Development, Market Power and The Law, (Paris, 1970) p. 166.

30. There are indications, however, that the Federal Cartel Office is increasingly prepared to go beyond informal pressure, and use the authority bestowed upon it.

31. Blake, *op. cit.*, note 1, p. 211.

32. *Ibid*, pp. 213, 214.

VII. INTERLOCKING DIRECTORATES

The Act Against Restraints of Competition does not deal with interlocking directorates as such. In Section 23, however, dealing with the reporting of mergers, the following appears:

> The following transactions should be deemed mergers within the meaning of this Act.
>
> Accomplishing a situation where at least half of the members of the supervisory board, the board of managers, or any other body of enterprises appointed to manage their affairs are identical.

Bringing about such a situation means that a merger is considered to have occurred: if the market share criterion of 20 per cent is met, or if the 10,000 employees or DM 500 million annual turnover requirement is satisfied, the merger must be reported; if the Federal Cartel Office finds that a market-dominating position has been created or strengthened the merger is likely to be prohibited by the Office with the possibility that the Minister of Economics will be prepared to permit the merger because of its contribution to the public interest.

It is difficult to assign much importance to this provision. To illustrate: of the 318 mergers notified in 1974, only one was of the above-described interlocking directorate type, and, for 1973, the comparable figures are 243 and one. Acquisition of assets, acquisition of shares and joint ventures are the forms that practically all notified mergers take.

Thus, the German Act Against Restraints of Competition does not attack interlocking directorates as such. It does recognize however, that an interlocking situation may be equivalent to a merger insofar as competitive consequences are concerned.

Accordingly, the Act closes the door against the possible use of the interlocking procedure to achieve the results of a merger whilst escaping the need to report the changed relationship to the Cartel Office. Mergers resulting from interlocks of the category described in the Act must be notified, with all the implications that notification entails.

Interlocking directorates as noted are referred to in the German Act Against Restraints of Competition only in the merger notification requirement of the Act - and here only insofar as the language of the legislation may be taken to reflect the general concept of interlocking. The logic, however, of the merger notification obligation leads to the proposition that such interlocks are relevant in Section 22 cases dealing with abusive practices by dominant firms. On the one hand, the substantiality of the competition faced by a firm will not be independent of any interlocking relationships it may have with other firms in the industry. And in determining whether or not a particular firm meets the presumptive one third of the market share, the sales of any firm with which it is linked through an interlock as defined in the merger reporting provision would necessarily have to be included in the calculation.[33]

It should be mentioned that the interlocking directorate problem is considered in German legislation other than that dealing with competition. MacLennan, Forsyth and Denton report that Company Law, as of January 1, 1966, established the following requirements: One person was not allowed to sit on the supervisory board of more than 10

companies and it was forbidden for a representative of one company to sit on another company's supervisory board if a member of the latter company's management sits on the former's supervisory board.[34]

VII. INTERLOCKING DIRECTORATES

Footnotes

33. Attention may be drawn to the "overriding market position" criterion for market dominance. The phrase "links with other enterprises" would presumably include an interlocking link.

34. M. MacLennan, M. Forsyth, and G. Denton, Economic Planning and Policies in Britain, France and Germany. (Praeger Publishers, New York, 1968) p. 69. In Blake, op. cit., note 1, p. 57, the situation is described as follows: "The supervisory board of a stock corporation may not include executives of enterprises dominated by that corporation. It may not include a member of the managing board of another stock corporation or limited liability company if the supervisory board of that firm already includes an executive of the first company or corporation. With certain statutory exceptions no person may serve in the supervisory board of more than 10 firms."